89-1022

Supreme Court, U.S.
FILED
DEC 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PEPSICO, INC.,

Petitioner,

vs.

CLINTON SHARP,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

ROGER PASCAL *
CYNTHIA N. SARNO
PATRICIA J. THOMPSON
SCHIFF HARDIN & WAITE
7200 Sears Tower
Chicago, Illinois 60606
(312) 876-1000
Counsel for Petitioner

* Counsel of Record

QUESTION PRESENTED

Rule 13 of the Oklahoma Workers' Compensation Court Rules provides that a proceeding for compensation under the Workers' Compensation Act "shall be commenced" by filing a notice of claim. Okla. Stat. tit. 85, ch. 4, App. Rule 13 (1981 & 1987). Construing this requirement for initiating an action under the Oklahoma Workers' Compensation Act, the Oklahoma Supreme Court held in *Wilsey, Bennett Co. v. Grant*, 632 P.2d 382 (Okla. 1981), that "a timely-filed compensation claim will operate to commence a proceeding against *any* party-respondent shown on the claim form by a name or designation that sufficiently identifies that entity for delivery of notice either to it or to its insurance carrier." *Id.* at 386 (emphasis in original).

The question presented is:

1. Whether the entry by the Oklahoma Workers' Compensation Court En Banc of a judgment against a guarantor that was not named or designated as a party-respondent on the workers' compensation claim, that was not identified for delivery of notice and that was not served with process in the action violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

This action was commenced in the Workers' Compensation Court of the State of Oklahoma on March 8, 1984, by Clinton Sharp ("Sharp") against Lee Way Motor Freight, Inc. ("Lee Way"), a former subsidiary of PepsiCo, Inc. ("PepsiCo").[1] PepsiCo was "joined as a party respondent" in an Order on Appeal issued by the Workers' Compensation Court En Banc on August 2, 1988. App. 18 *et seq.*

[1] Pursuant to Supreme Court Rule 28.1, a list of PepsiCo's related corporations is set forth at Appendix ("App.") 78 *et seq.*

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES .. 2

STATEMENT OF THE CASE 2

Proceedings in the Workers' Compensation Trial Court 4

Proceedings Before the Workers' Compensation Court En Banc 6

Proceedings Before the Supreme Court of Oklahoma 8

REASONS FOR GRANTING THE WRIT 11

A. Joinder Must Comport with the Requirements of Due Process 13

B. Joinder Consistent with Due Process Requires Commencing an Action Against the Person Sought to be Joined 15

C. Joinder Consistent with Due Process Requires Service of Process on the Person Sought to be Joined 20

1. Sharp failed to serve PepsiCo with process as required under the Oklahoma Workers' Compensation Act ... 20

2. Sharp failed to serve PepsiCo with process as required under the Oklahoma Code of Civil Procedure 21

CONCLUSION 23

INDEX TO APPENDICES ..... App. i

TABLE OF AUTHORITIES

Cases PAGE

Boone Landfill, Inc. v. Boone County, 51 Ill. 2d 538, 283 N.E.2d 890 (1972) 20

Hansberry v. Lee, 311 U.S. 32 (1940) 11

Lane Construction & Plumbing Co. v. Green, 451 P.2d 947 (Okla. 1969) 16

Lum v. Lee Way Motor Freight, Inc., 757 P.2d 810 (Okla. 1987) 6, 8

McDonald v. Mabee, 243 U.S. 90 (1917) 13

Moore v. Knowles, 482 F.2d 1069 (5th Cir. 1973) . 13

Newbury v. Industrial Commission, 341 Ill. 554, 173 N.E. 472 (1930) 18, 20

Pennoyer v. Neff, 95 U.S. 714 (1878) 12

Pope v. Intermountain Gas Co., 103 Idaho 217, 646 P.2d 988 (1982) 14

Sarne v. Fiesta Motel, 79 F.R.D. 567 (E.D. Pa. 1978) 13

Schweiker v. Hansen, 450 U.S. 785 (1981) 13

Spudnuts, Inc. v. Lane, 139 Ariz. 35, 676 P.2d 669 (1984) 13, 14

Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957) ... 12

Wilsey, Bennett Co. v. Grant, 632 P.2d 382 (Okla. 1981) ..... i, 15-20, 22

Winnebago County v. Industrial Commission, 336 Ill. 466, 168 N.E. 273 (1929) 17-18, 20

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 11-12

Constitutional Provisions

U.S. Const. amend. XIV, §1 ..... i, 2, App. 67

Statutes

28 U.S.C. §1257(a) (1982) 2

Sup. Ct. Rule 23.1, 28 U.S.C. Rule 23.1 (1982) ... 13

Okla. Stat. tit. 12, §2004(C)(1)(c)(3) (1989) ... 22, App. 70

Okla. Stat. tit. 12, §2004(C)(2)(a)-(b) (1989) . 22, App. 70-71

Okla. Stat. tit. 12, §2015(A) (1984) ..... 17, App. 73

Okla. Stat. tit. 12, §2019(A) (1984) ..... 21-22, App. 74

Okla. Stat. tit. 85, ch. 4, App. Rule 2 (1981) .. 21

Okla. Stat. tit. 85, ch. 4, App. Rule 11 (1981) ... . 16, App. 75-76

Okla. Stat. tit. 85, ch. 4, App. Rule 13 (1981) ... . i, 15-16, 18-20

Okla. Stat. tit. 85, ch. 4, App. Rule 13 (1987) ... . i, 15, 20-21, App. 77

Okla. Stat. tit. 85, ch. 4, App. Rule 35 (1981) ... 3

Okla. Stat. tit. 85, §42 (1983) 9-10

Okla. Stat. tit. 85, §61(d) (1986) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PEPSICO, INC.,

Petitioner,

vs.

CLINTON SHARP,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Oklahoma, entered in this action in appeal No. 71,575 on September 20, 1989.

OPINIONS AND ORDERS BELOW

The Order of the Workers' Compensation Trial Court issued against Lee Way, awarding Sharp workers' compensation benefits, is reproduced at App. 15 *et seq.* The Order on Appeal of the Workers' Compensation Court En Banc affirming the Trial Court's award and joining PepsiCo as a party-respondent is reproduced at App. 18 *et seq.* The Corrected Order on Appeal of the Workers' Compensation Court En Banc denying Sharp's request for attorney's fees is reproduced at App. 20 *et seq.* The unreported

opinion of the Supreme Court of Oklahoma affirming PepsiCo's liability for payment of Sharp's workers' compensation award and finding that PepsiCo was not denied due process of law is reproduced at App. 1 *et seq.* Finally, the order denying PepsiCo's Petition for Rehearing before the Supreme Court of Oklahoma is reproduced at App. 22 *et seq.*

JURISDICTION

The decision of the Supreme Court of Oklahoma was entered on July 18, 1989. PepsiCo timely filed a Petition for Rehearing in the Supreme Court of Oklahoma on August 7, 1989. PepsiCo's Petition for Rehearing was denied by the Supreme Court of Oklahoma in an order entered on September 20, 1989. The jurisdiction of the Court is invoked under 28 U.S.C. §1257(a) (1982).

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The pertinent texts of the Fourteenth Amendment to the United States Constitution, the Oklahoma Code of Civil Procedure, the Oklahoma Workers' Compensation Act, and the Rules of the Workers' Compensation Court promulgated pursuant thereto are set forth at App. 67 *et seq.*

STATEMENT OF THE CASE

In December 1983, Respondent Clinton Sharp was employed by Lee Way, which was then a wholly-owned subsidiary of PepsiCo and an own-risk employer under the

Oklahoma Workers' Compensation Act.[2] In June, 1984, PepsiCo closed in escrow the sale of the stock of Lee Way to Commercial Lovelace Motor Freight, Inc. ("CL"). Lee Way was informed by the Administrator of the Oklahoma Workers' Compensation Court that, in order to maintain its own-risk status, PepsiCo, as the parent company of Lee Way, would be required to provide a written guaranty stating that PepsiCo would be responsible for any liabilities that Lee Way might incur under the Oklahoma Workers' Compensation Act. *See* Okla. Stat. tit. 85, ch. 4, App. Rule 35 (1981).[3]

On July 27, 1984, PepsiCo submitted the statutorily-required guaranty, pursuant to which Lee Way was allowed to maintain its own-risk status. The escrow pursuant to which Lee Way stock was sold to CL disbursed on August 6, 1984, and on August 29, 1984, PepsiCo revoked its

---

[2] Under the Oklahoma Workers' Compensation Act, an own-risk employer is authorized by the Workers' Compensation Court to self-insure for its workers' compensation liabilities "[b]y furnishing satisfactory proof to the Administrator of the employer's ability to pay such compensation." *See* Okla. Stat. tit. 85, §61(d) (1986).

[3] Such a guaranty was then required by Rule 35 of the Workers' Compensation Court Rules, which, at all times relevant hereto, stated in pertinent part:

> Any subdivision or subsidiary of any employer, which has already been authorized by the court to self-insure, may likewise be separately authorized to self-insure PROVIDED that the subdivision or subsidiary independently meets all of the above qualifications. If the subdivision or subsidiary does not independently meet these qualifications, it may be separately authorized to self-insure PROVIDED that the parent or principal employer guarantees in writing that it will be fully responsible for any liabilities that its subdivision or subsidiary may incur under the Workers' Compensation Act.

Okla. Stat. tit. 85, ch. 4, App. Rule 35 (1981).

guaranty. In November, 1984, CL shut down Lee Way. On February 27, 1985, Lee Way was merged into CL and CL's name was changed to Lee Way Holding Company ("LWHC"). On March 7, 1985, LWHC filed for relief under Chapter 11 of title 11 of the United States Code.

When Lee Way ceased operations, it also ceased payment of workers' compensation benefits or awards. Hundreds of former employees who had not obtained awards against Lee Way from the Oklahoma Workers' Compensation Court, as well as those employees seeking to enforce awards on which Lee Way had defaulted, looked to PepsiCo, as guarantor, for the payment of the workers' compensation liabilities incurred by its former subsidiary. Among them was Clinton Sharp.

Proceedings in the Workers' Compensation Trial Court

On March 8, 1984, Sharp commenced a proceeding for compensation under the Oklahoma Workers' Compensation Act by filing a Form 3, Employee's First Notice of Accidental Injury and Claim for Compensation ("Form 3"), claiming injury to his lower back. App. 26 *et seq.* Sharp filed this claim solely against his employer, Lee Way. Sharp never sought to amend his claim to include any additional party-respondent.

On November 16, 1984, Sharp filed a Form 9, Motion of Claimant to Set for Hearing ("Form 9"), by which he moved to set for a hearing on the merits his claim against Lee Way for temporary disability. App. 29 *et seq.* The Form 9 indicates that a copy was sent to Albert M. Morrison ("Morrison"), the attorney representing Lee Way.

On January 9, 1985, the Workers' Compensation Court issued a "Notice of Trial Date" setting Sharp's claim for

hearing on January 22, 1985. App. 31 *et seq.* The Notice of Trial Date listed the action as follows:

84-3754-K		
TTD & MEDICAL		LEE WAY MOTOR
CLINTON SHARP	VS	FREIGHT
JIM GRENNAN		OWN RISK –
		AL MORRISON
	&/OR	PEPSICO – CERT
		NOTICE[4]

Although a copy of this Notice of Trial Date was purportedly sent to PepsiCo by certified mail, the hearing originally set for January 22, 1985, was "postponed in order to give PepsiCo notice." App. 5.

A second Notice of Trial Date was issued by the Workers' Compensation Court on February 7, 1985, resetting the hearing for February 25, 1985. App. 34 *et seq.* The information contained on the second Notice of Trial Date (other than the hearing date) was identical to that contained on the prior notice. *Compare* Appendix I *with* Appendix J.

On February 25, 1985, a hearing was held before Judge Brawner of the Oklahoma Workers' Compensation Court. After noting that the nature of the claimant's injury, the applicable disability rates, and the dates up to which benefits were paid and from which benefits were owing had been agreed by stipulation, Judge Brawner stated that the only real issue to be determined in the case was

[4] "TTD & MEDICAL" stands for Temporary Total Disability and Medical Treatment. The name of the represented person is followed by the name of the attorney by whom the person is represented. Thus, Jim Grennan was designated as counsel for Sharp and Al Morrison as counsel for Lee Way. "Cert Notice" indicates that the Notice of Trial Date was sent by certified mail to the person indicated.

whether the order should be written against Lee Way or against Lee Way and PepsiCo. App. 5.

Sharp's counsel requested that a specific finding be made part of the court's order, ordering payment by either Lee Way or PepsiCo as guarantor for Lee Way. Implicitly refusing Sharp's request, on March 26, 1985, Judge Brawner entered an order granting an award in favor of Sharp (the "Trial Court Order"), but entered the order solely against Lee Way. App. 15. Sharp did not appeal from the Trial Court Order and the court's refusal to add PepsiCo as a party-respondent.

Proceedings Before the Workers' Compensation Court En Banc

On April 4, 1985, Lee Way filed a Notice of Appeal to the Workers' Compensation Court En Banc. The proceedings in the Workers' Compensation Court En Banc were stayed pending the Oklahoma Supreme Court's decision in *Lum v. Lee Way Motor Freight, Inc.*, 757 P.2d 810 (Okla. 1987). In *Lum*, the Oklahoma Supreme Court interpreted the scope of PepsiCo's guaranty and whether it applied retroactively to awards granted prior to the execution of PepsiCo's guaranty.

On November 18, 1987, following the issuance of *Lum*, PepsiCo filed an Answer in the proceedings before the Workers' Compensation Trial Court on Sharp's claim against Lee Way. App. 37 *et seq.* As an affirmative defense, PepsiCo moved to dismiss Sharp's claim on the grounds, *inter alia*, of lack of personal and subject matter jurisdiction, insufficiency of service of process, and improper joinder. App. 39.

On June 22, 1988, Sharp filed with the Workers' Compensation Court En Banc a document entitled "Motion to

Set for Hearing Before Court En Banc and Motion for Order on Appeal to Include PepsiCo, Inc. as Guarantor for Lee Way Motor Freight, Inc." ("Sharp's Motion"). App. 41 *et seq.* In Sharp's Motion, he prayed that the Trial Court Order be affirmed and that the Workers' Compensation Court En Banc "further Order on Appeal" that PepsiCo be held liable for the Trial Court Order. App. 42.

PepsiCo filed a Brief in Opposition to Sharp's Motion. App. 44 *et seq.* In its brief, PepsiCo asserted, *inter alia*, that the statutory and due process requirements for PepsiCo's proper joinder as a respondent in the action had not been met. Specifically, PepsiCo argued that it had not received the required notice and service of process, and that the Court En Banc's exercise of jurisdiction over PepsiCo would violate PepsiCo's constitutional right to due process of law under the Fourteenth Amendment to the United States Constitution. App. 51-52. PepsiCo additionally asserted that the Workers' Compensation Court En Banc was without authority to modify the Trial Court Order by adding PepsiCo as a party. App. 55-56.

The hearing before the Workers' Compensation Court En Banc was held on July 29, 1988. On August 2, 1988, the Workers' Compensation Court En Banc issued its Order on Appeal. App. 18 *et seq.* Although finding that the Trial Court Order entered on March 28, 1985, which did not join PepsiCo, "was not against the clear weight of the evidence nor contrary to law . . . ," the Court En Banc made additional findings, joined PepsiCo as a party-respondent, and held PepsiCo liable for the payment of Sharp's award. The Court En Banc then "AFFIRMED" the Trial Court Order "based upon" these additional findings, which read as follows:

I

That PEPSICO, INC. by the execution of its guaranty has stepped into the shoes of LEE WAY MOTOR FREIGHT, INC. and is hereby joined as a party respondent following the law decided in the case *Lum v. Lee Way Motor Freight, Inc.*, No. 64,213, slip op. (Sup. Ct. of Okl. November 10, 1987).

II

That PEPSICO, INC. is responsible for the payment of this claim which arose prior to the revocation of PEPSICO'S guaranty, see Lum [sic], *supra*. The pivotal date in determining the applicability of PEPSICO'S guaranty is the date the claim arose, not the date of the Court's order. The retrospective application of the guaranty seen in the *Lum* case is equally appropriate in the instant case.

Respondent or insurance carrier is hereby ordered to pay interest on the accrued portion of said award at the rate of 18% per year from the date of the award.

App. 19.

On August 5, 1988, the Workers' Compensation Court En Banc issued a Corrected Order on Appeal denying Sharp's previously unaddressed request for attorney's fees based on the alleged "frivolity" of PepsiCo's appeal. App. 20.

Proceedings Before the Supreme Court of Oklahoma

On August 22, 1988, PepsiCo filed in the Supreme Court of Oklahoma a Petition for Review and Preliminary Statement in which it raised, *inter alia*, the following issues and errors on appeal:

1. That the Workers' Compensation Court *En Banc* [did] not have jurisdiction to entertain a motion to join an [additional] party.

2. That the Workers' Compensation Court erred in exercising jurisdiction over PepsiCo in this case because PepsiCo [had] not been properly served as a party respondent.

* * *

9. That PepsiCo [had] been denied due process of law.

App. 65-66. On August 29, 1988, Sharp filed a Petition for Review and Preliminary Statement, appealing from the Corrected Order on Appeal denying his request for attorney's fees.

On July 18, 1989, the Oklahoma Supreme Court filed its Opinion in *Sharp* (the "Opinion") sustaining the Order on Appeal and Corrected Order on Appeal. App. 1 *et seq.* The Opinion contains serious inaccuracies and misstatements of the record. The most striking of these is the court's incorrect designation of the nature of the hearing below, of which it held PepsiCo received notice sufficient to satisfy due process.

In the Opinion, the court repeatedly refers to the "certification hearing," PepsiCo's receipt of "notice of the certification hearing," and the Workers' Compensation Court En Banc's affirmance of the "certification order."[5] App.

[5] A certification hearing may take place only *after* an award has been entered and gone unpaid for more than 10 days. The procedure to obtain certification of an award upon default was, at all times relevant hereto, set forth in Okla. Stat. tit. 85, §42 (1983), which provided, in pertinent part, as follows:

(Footnote continued on following page)

5, 8, 10, 11. The record below shows, however, that the February 25, 1985 hearing to which the Opinion repeatedly refers as a "certification hearing" was, in fact, the hearing at which Sharp's award was entered, not a hearing at which a previously entered award was certified. Because no award had been previously entered and because, therefore, Lee Way could not have been in default, there could have been no certification hearing, no notice of a certification hearing, no order of certification, and no subsequent affirmance of an order of certification.

Despite the record, the Oklahoma Supreme Court found that "[n]otice of the certification hearing was provided to PepsiCo by certified mail." The Oklahoma Supreme Court then held that, because PepsiCo was given "notice of the hearing and an opportunity to be heard, due process requirements were satisfied and the jurisdiction of the Workers' Compensation Court was properly invoked." App. 10. The court further held that the Workers' Compensation Court En Banc had the authority to add PepsiCo as a "party respondent guarantor." App. 10-11.

---

[5] *continued*

> **§ 42. Failure to pay compensation-Judgment and execution-Interest-Revocation or suspension of insurer's license**
>
> If payment of compensation or an installment payment of compensation due under the terms of an award, except in case of appeals from an award, is not made within ten (10) days after the same is due by the employer or insurance carrier liable therefor, the Court may order a certified copy of the award to be filed in the office of the court clerk and the county clerk of any county, which award whether accumulative or lump sum shall be entered on the judgment docket of the district court, and shall have the same force and be subject to the same law as judgments of the district court. . . .

Okla. Stat. tit. 85, §42 (1983).

On August 7, 1989, PepsiCo timely filed a Petition for Rehearing, asserting, *inter alia*, that the Supreme Court of Oklahoma erred in holding that PepsiCo had received notice and service of process sufficient to satisfy the Due Process Clause of the Fourteenth Amendment to the United States Constitution. On September 20, 1989, the Oklahoma Supreme Court issued an order denying PepsiCo's Petition for Rehearing. App. 22 *et seq.*

REASONS FOR GRANTING THE WRIT

The Supreme Court of Oklahoma has Established a Constitutionally Infirm Procedure that will Apply Broadly to Petitioner and Others by which the Oklahoma Workers' Compensation Court May Enter Judgment Against One Over Whom It Has Not Obtained Personal Jurisdiction.

In *Sharp*, the Supreme Court of Oklahoma held that the entry by the Oklahoma Workers' Compensation Court En Banc of a judgment against a guarantor that was not named or designated as a party-respondent or made a party by service of process was consistent with the requirements of constitutional due process. By so holding, the Supreme Court of Oklahoma ignored well settled and stable principles of constitutional law and decided an important question of federal law in a way that directly conflicts with controlling precedent of this Court.

"It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) (citing *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940)). "The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless

it has jurisdiction over the person of the defendant." *Id.* (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957)).

In total disregard of this firmly established rule of constitutional law, the Supreme Court of Oklahoma, in *Sharp*, established a dangerous and far-reaching precedent by which it has impermissibly empowered the Oklahoma Workers' Compensation Court to enter judgment against one over whom it has not secured personal jurisdiction.[6] Such procedure is constitutionally infirm and denies the one against whom judgment is entered the right to due process under the Fourteenth Amendment to the United States Constitution.

Sharp is an important case because it is controlling on the issue of due process in hundreds of cases claiming millions of dollars currently pending in various stages of proceedings in the Oklahoma Workers' Compensation Trial Court or Court En Banc and the Supreme Court of Oklahoma. The *Sharp* decision directly impacts upon not only statutory guarantors, like PepsiCo, but also all potential respondents from which workers' compensation benefits may be sought. If *Sharp* is allowed to stand, it will not

---

[6] The Supreme Court of Oklahoma bases its holding that PepsiCo was afforded due process upon its finding that PepsiCo received "notice of the hearing and an opportunity to be heard." App. 10. The court explicitly rejected as the "basis for determination of this issue" the presence of PepsiCo's counsel at the February 25, 1985 hearing and his statement that PepsiCo had been served. App. 10 n.7. In any event, the presence of PepsiCo's counsel at the hearing could not have conferred upon the Workers' Compensation Court jurisdiction over PepsiCo because PepsiCo was never named as a party in the action. *See* discussion, *infra*, at 15-19. This Court should, of course, accept the Oklahoma Supreme Court's holding that *Sharp* does not rest on counsel's appearance and statements because *Sharp* has been and will be enforced against Petitioner in millions of dollars worth of other cases without regard to those factors.

only wreak havoc in the Oklahoma Workers' Compensation Court and the Supreme Court of Oklahoma, it will also seriously erode the firmly-established constitutional protections afforded all persons under the Due Process Clause.

Because the law in this area is well settled and stable, the facts are not in dispute, and the decision below is clearly in error, summary reversal is appropriate. *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting).[7]

A. Joinder Must Comport with the Requirements of Due Process.

No court has license to join an additional party in violation of that party's constitutional right to due process. *Moore v. Knowles*, 482 F.2d 1069, 1075 (5th Cir. 1973) (vacating judgment against school board; post-judgment addition of defendant who had never been served violated due process); *Sarne v. Fiesta Motel*, 79 F.R.D. 567, 570 (E.D. Pa. 1978) (declaring void judgment entered against defendant joined after all evidence of liability had been received when such defendant was never served with process).[8] *See also Spudnuts, Inc. v. Lane*, 139 Ariz. 35,

[7] Under Supreme Court Rule 23.1, 28 U.S.C. Rule 23.1 (1982), a summary disposition on the merits may be ordered by the Court.

[8] The *Sarne* court explained the necessity of the court obtaining jurisdiction over the party sought to be joined as follows:

> The foundation of jurisdiction is physical power over a defendant. *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). The basic purpose of serving *original process* is to assert that power, inform the defendant of suit, and advise him as to the nature of the claim. . . . The party to be added must be properly brought before the court or no judgment can be entered or enforced. The requirements of due process must be met. *Moore v. Knowles*, 482 F.2d 1069, 1075 (5th Cir. 1973).

Id., 79 F.R.D. at 570 (emphasis added).

676 P.2d 669, 670-71 (1984) (vacating judgment because post-judgment addition of party-defendant who had not been served with process violated due process); *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988, 992 n.7 (1982) (suggesting that granting plaintiffs' motion to amend complaint to join a party, made after plaintiffs rested their case, when party had not been served with summons and complaint, would violate due process).

The joinder procedure established by *Sharp*, like the procedures rejected in the aforementioned cases, violates due process because it allows entry of a judgment against a person who has not been named as a defendant or served with process. Indeed, the notice on which the Supreme Court of Oklahoma relies to hold that PepsiCo's joinder met the requirements of due process was no more than a notice of the trial date in an action that was being pressed against Lee Way, not PepsiCo—not a notice of a claim or an amended claim designating PepsiCo as a party-respondent. No claim naming or designating PepsiCo as a party-respondent was ever filed by Sharp. Correspondingly, no notice of claim was ever mailed to PepsiCo by the Workers' Compensation Court.

With no proceeding against PepsiCo having ever been commenced in the trial court, Sharp moved the Workers' Compensation Court En Banc, not to amend his claim to name PepsiCo as a party, but to *include* PepsiCo in the post-judgment Order on Appeal. The Court En Banc, in the Order on Appeal, simply joined PepsiCo as a party-respondent, although Sharp had never named or served PepsiCo as a party, and held PepsiCo liable for Sharp's award. Under applicable and controlling law, such joinder violated PepsiCo's right to due process.

B. Joinder Consistent with Due Process Requires Commencing an Action Against the Person Sought to be Joined.

In order for the Oklahoma Workers' Compensation Court to obtain personal jurisdiction over a respondent, an action must be commenced against that person or entity by designating that person or entity as a party-respondent. *See Wilsey, Bennett Co. v. Grant*, 632 P.2d 382, 386 (Okla. 1981), discussed *infra*. The method by which party designation is to be accomplished is set forth in Rule 13 of the Workers' Compensation Court Rules, which prescribes the mandatory procedure for commencing actions in proceedings for compensation under the Workers' Compensation Act. Okla. Stat. tit. 85, ch. 4, App. Rule 13 (1981 & 1987).[9] Rule 13 directs that "a proceeding for

[9] At all times relevant hereto, Rule 13 of the Workers' Compensation Court Rules, governing commencement of a claim for workers' compensation benefits, provided as follows:

Rule 13. Commencement of Claim

A proceeding for compensation under the Workers' Compensation Act shall be commenced by filing, in triplicate, the appropriate notice form. Form 3 shall be used for accidental injury benefits; Form 3a, for death benefits; and Form 3b, for occupational disease benefits. A proceeding for recovery of health service expenses (physician's fees, hospital costs, etc.) shall be commenced by filing, in duplicate, Form 19. A claim against the Special Indemnity Fund shall be deemed to have been commenced in all cases in which either a Form 3 or Form 3b is filed, provided that such form shows that the claimant has had a prior disability adjudication or an obvious previous impairment.

When the claimant files one of the notice of claim forms by which a proceeding is initiated (Form 3, Form 3a or Form 3b), a copy of that notice of claim form, bearing the assigned case number and the filing date, shall be mailed by the court to the employer and the insurance carrier. If the notice of claim form indicates that the claimant has

(Footnote continued on following page)

compensation under the Workers' Compensation Act *shall be commenced* by filing the appropriate notice form." *Id.* (emphasis added). The form required to commence an action for accidental injury benefits under the Oklahoma Workers' Compensation Act, like those sought by Sharp, is a "Form 3-Employee's First Notice of Accidental Injury And Claim For Compensation." Okla. Stat. tit. 85, ch. 4, App. Rule 11 (1981). Sharp never filed a Form 3 naming PepsiCo.

In *Wilsey, Bennett Co. v. Grant*, 632 P.2d 382 (Okla. 1981), the Supreme Court of Oklahoma emphasized the mandatory prerequisite of filing a proper claim to commence proceedings against a party-respondent in workers' compensation actions.[10] Construing this requirement, the *Wilsey, Bennett* court pronounced that

---

[9] *continued*

had a prior disability adjudication or has an obvious previous impairment, a copy of the form shall be mailed by the court to the Special Indemnity Fund.

Okla. Stat. tit. 85, ch. 4, App. Rule 13 (1981).

[10] In *Wilsey, Bennett*, two drivers were killed in an accident. Two separate claim forms were timely filed naming as parties-respondent both the immediate employer and some entity mistakenly believed to be the principal employer. The entity's answer revealed that neither it nor its insurance carrier was the correctly named party-respondent. After the limitations period had run, amended claim forms were filed naming a different principal employer and a different insurance carrier. *Id.* at 384.

Overruling its holding in *Lane Construction & Plumbing Co. v. Green*, 451 P.2d 947 (Okla. 1969), the Supreme Court of Oklahoma held in *Wilsey, Bennett* that naming and serving a party-respondent within the statutory limitations period was an absolute prerequisite to commencing an action against that party:

> That case [*Lane Construction*] appears to rest on the notion that parties-respondent in a compensation proceeding stand identified by operation of law. Implicit in it is an assumption that the choice of adversaries is accomplished

(Footnote continued on following page)

> a timely-filed compensation claim will operate to commence a proceeding against *any* party-respondent shown on the claim form by a name or designation that sufficiently identifies that entity for delivery of notice either to it or to its insurance carrier.

632 P.2d at 386 (emphasis in original).

Applying this "test" to the facts before it, the court in *Wilsey, Bennett* held that the claimant's failure to correctly designate the principal employer on "the tribunal-prescribed form . . . failed to identify that employer sufficiently to effect delivery of notice to the *right* party or to its insurance carrier. No claim was hence commenced against that party-respondent . . . ." *Id.* (emphasis in original) (footnotes omitted).

The facts before the Supreme Court of Oklahoma in *Sharp* were far more egregious than those before the same court in *Wilsey, Bennett*. In *Sharp*, no claim or amended claim[11] naming PepsiCo as a party-respondent

---

[10] *continued*

> automatically as a result of one's employer status *vis-a-vis* the injured worker at the time of injury rather than by a conscious act of the claimant timely identifying on the face of his claim form those who are legally responsible to protect him. We must reject the notion that the parties liable for compensation—no matter how deficiently identified on the timely filed claim form—are amenable to some automatically imposable joinder as litigants in a compensation claim.

Wilsey, Bennett, 632 P.2d at 384.

[11] The Oklahoma Code of Civil Procedure and the forms officially adopted by the Workers' Compensation Court contemplate amending the pleading by which an action is commenced to add additional parties. *See, e.g.*, Okla. Stat. tit. 12, §2015(A) (1984); Form 9 Motion of Claimant to Set for Hearing. *Cf. Winnebago County*

(Footnote continued on following page)

was ever filed with the Workers' Compensation Court. Therefore, under the rule of *Wilsey, Bennett* and the clear mandate of Rule 13, no proceeding was ever commenced against PepsiCo.

In response to PepsiCo's assertion on appeal that it was entitled to receive a notice of claim naming PepsiCo as a party-respondent, the Oklahoma Supreme Court found that PepsiCo was neither Sharp's employer nor an insurance carrier, and held that "Rule 13 was inapplicable to PepsiCo as a guarantor." App. 9. The court alternatively found that even if Rule 13 applied to PepsiCo, the rule was satisfied by notice to Lee Way "a subsidiary wholly-owned by PepsiCo." App. 9. The court went on to distinguish *Wilsey, Bennett*, reasoning that in *Wilsey, Bennett*, the "misnamed party and the proper party were not subsidiaries or alter-egos of the other." *Id.*[12]

As shown above, *Wilsey, Bennett* makes no distinction among prospective parties; its holding encompasses the commencement of proceedings against "*any* party-respondent." 632 P.2d at 326. Moreover, consistent with

---

[11] *continued*

v. Industrial Commission, 336 Ill. 466, 168 N.E. 273 (1929) (discussed *infra* at 20); *Newbury v. Industrial Commission*, 341 Ill. 554, 173 N.E. 472 (1930) (discussed *infra* at 20). Indeed, the Form 9 Motion of Claimant to Set for Hearing *instructs* the claimant, at paragraph 2, to "[i]ndicate any *material* amendments that will be offered to the previously filed Form 3." In paragraph 2 of the Form 9 sent to Morrison in November 1984, Sharp indicated as material amendments to the previously filed Form 3 "NONE." Sharp neither moved to amend nor amended his Form 3 to name PepsiCo as a party-respondent. He simply moved the Workers' Compensation Court En Banc for an Order on Appeal to "include" PepsiCo.

[12] Curiously, the court acknowledged that *Wilsey, Bennett* "rejected the notion that the parties stood identified by operation of law and were automatically joined as litigants though not timely identified on the face of the workers' claim." App. 9.

Wilsey, Bennett, that portion of Rule 13 that explicitly addresses the commencement of proceedings for workers' compensation benefits by the filing of a claim makes no distinction as to the status of the person against whom the action is to be commenced.[13] Finally, the court's reason for rejecting the controlling precedent of *Wilsey, Bennett* was based on its misapprehension that PepsiCo and Lee Way had a parent-subsidiary or alter-ego relationship. As acknowledged by the court itself, at the point at which PepsiCo received the notice of hearing that the court deemed sufficient to satisfy due process, *PepsiCo no longer owned Lee Way*. App. 4. Therefore, no parent-subsidiary relationship existed between Lee Way and PepsiCo at that time, and the court's distinction and rejection of *Wilsey, Bennett* has no basis in law or in fact.

Accordingly, in order to join PepsiCo in a proceeding for compensation under the Workers' Compensation Act in a manner consistent with due process, an action had to be commenced against PepsiCo by the filing of an original or amended Form 3. Because no such claim was ever filed against PepsiCo, the joinder of PepsiCo violated due process.

---

[13] Even assuming that Rule 13 did not apply to PepsiCo and, therefore, that the *more stringent* requirements of the Oklahoma Code of Civil Procedure were required to be followed, the manner employed to join PepsiCo was nonetheless improper. *See infra*, at 21-23.

C. Joinder Consistent with Due Process Requires Service of Process on the Person Sought to be Joined.

1. Sharp failed to serve PepsiCo with process as required under the Oklahoma Workers' Compensation Act.

Under *Wilsey, Bennett,* the jurisdiction-conferring act legally sufficient to permit the Workers' Compensation Court to exercise its power over a party-respondent is the service upon the prospective party of a workers' compensation claim form. *Cf., Winnebago County v. Industrial Commission*, 336 Ill. 466, 470-471, 168 N.E. 273, 274 (1929) (where a person was not named in the petition as a party or the party against which compensation was prayed, the Industrial Commission was without jurisdiction to enter an award against such person), *overruled on other grounds, Boone Landfill, Inc. v. Boone County*, 51 Ill. 2d 538, 283 N.E.2d 890 (1972). *See also Newbury v. Industrial Commission*, 341 Ill. 554, 558, 173 N.E. 472, 474 (1930) (recognizing application filed with the Industrial Commission as pleading that must be amended to join party before an award could be entered against such party). Service of the claim form on which the party-respondent is sufficiently designated constitutes service of process under the Oklahoma Workers' Compensation Act. *See* Okla. Stat. tit. 85, ch. 4, App. Rule 13 (1981 & 1987).

As mentioned above, PepsiCo was never served with a claim form or amended claim form designating it as a party-respondent in Sharp's action against Lee Way. PepsiCo was sent by certified mail only a Notice of Trial Date. *See supra* at 6; App. 34 *et seq.* Neither controlling Oklahoma law including the Oklahoma Workers' Compensation Act, nor the Due Process Clause permits as a substitute for service of process the mailing of a notice of hearing to a person who has not yet been properly made a party to the action.

2. Sharp failed to serve PepsiCo with process as required under the Oklahoma Code of Civil Procedure.

Assuming *arguendo*, that the service provision of Rule 13 was not applicable to PepsiCo as a guarantor, the question of proper service of process would have been governed by the procedure set forth in the Oklahoma Code of Civil Procedure.[14]

Pursuant to Section 2019(A) of the Oklahoma Code of Civil Procedure, PepsiCo was a person needed for just adjudication and was, therefore, a necessary party to the action.[15] No relief could have been granted against PepsiCo, however, without first properly joining it as a party in the

---

[14] Rule 2 of the Workers' Compensation Court Rules provides as follows:

> Any matter of practice or procedure *not specifically dealt with* either by the Workers' Compensation Act or by these Rules will be guided by practice or procedure followed in the district courts of this state.

Okla. Stat. tit. 85, ch. 4, App. Rule 2 (1981) (emphasis added).

[15] Section 2019(A) of the Oklahoma Code of Civil Procedure provides as follows:

> A person who is subject to service of process shall be joined as a party in the action if:
>
> 1. In his absence complete relief cannot be accorded among those already parties; or
>
> 2. He claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: a) as a practical matter, impair or impede his ability to protect that interest; or b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.
>
> If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff.

Okla. Stat. tit. 12, §2019(A) (1984).

action, and proper joinder required proper notice to and service of process upon PepsiCo pursuant to the procedures set forth in the Oklahoma Code of Civil Procedure.

Section 2019(A) of the Oklahoma Code of Civil Procedure sets out the conditions under which a "person who is subject to service of process" may be joined as a party in a civil action. Okla. Stat. tit. 12, §2019(A) (1984). Clearly, the Code of Civil Procedure contemplates that parties may be joined in civil actions only through procedures of notice and service of process which are applicable to parties generally.

Section 2004(C)(1)(c)(3) of the Oklahoma Code of Civil Procedure provides that service upon a foreign or domestic corporation may be made "by delivering a copy of the summons and of the petition to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. . . ." Okla. Stat. tit. 12, §2004(C)(1)(c)(3) (1989) (previously codified at Okla. Stat. tit. 12, §2004(d)(3) (1984)). A corporation may also be served by the clerk of the court sending, by certified mail return receipt requested, a copy of the summons and petition to a person authorized to receive process for the corporation. Okla. Stat. tit. 12, §2004(C)(2)(a)-(b) (1989) (previously codified at Okla. Stat. tit. 12, §2004(C)(2) (1984)). In this case, PepsiCo was never served with process by either method.

The Oklahoma Supreme Court has made clear that the requirements of proper notice and service of process apply with full force and effect to *any* respondents in proceedings before the Workers' Compensation Court. *See Wilsey, Bennett Co. v. Grant*, 632 P.2d 382 (Okla. 1981), discussed *supra*, at 16-19. Sharp's failure to serve PepsiCo with process as required by the Oklahoma Workers' Compensa-

tion Court Rules or the Oklahoma Code of Civil Procedure therefore failed to confer upon the Oklahoma Workers' Compensation Court jurisdiction over PepsiCo.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion and judgment of the Supreme Court of Oklahoma. In view of the conflict of the decision below with past decisions of this Court, the Court may wish to consider summary reversal.

Respectfully submitted,

ROGER PASCAL *
CYNTHIA N. SARNO
PATRICIA J. THOMPSON
SCHIFF HARDIN & WAITE
7200 Sears Tower
Chicago, Illinois 60606
(312) 876-1000

Counsel for Petitioner

* Counsel of Record

APPENDICES

INDEX TO APPENDICES

		APP. PAGE
A.	Opinion of the Supreme Court of Oklahoma, *PepsiCo, Inc. v. Clinton Sharp*, Nos. 71,575 and 71,618, filed July 18, 1989	1
B.	Order of the Workers' Compensation Court Awarding Benefits to Clinton Sharp, filed March 28, 1985	15
C.	Order on Appeal of the Workers' Compensation Court En Banc Affirming the Order of the trial court, filed August 2, 1988	18
D.	Corrected Order on Appeal of the Workers' Compensation Court En Banc Denying Attorney's Fees, filed August 8, 1988	20
E.	Order of the Supreme Court of Oklahoma Denying PepsiCo's Petition for Rehearing, filed September 20, 1989	22
F.	Order of the Supreme Court of Oklahoma Granting Judgment against the Surety on the Appeal Bond, filed October 16, 1989	24
G.	Form 3, Employee's First Notice of Accidental Injury and Claim for Compensation, received March 8, 1984	26
H.	Form 9, Motion of Claimant to Set for Hearing, received November 20, 1984	29
I.	Notice of Trial Date of January 22, 1985, filed January 9, 1985	31

J. Notice of Trial Date of February 25, 1985, filed February 7, 1985 34

K. PepsiCo's Answer, received November 18, 1987 37

L. Sharp's Motion for Order on Appeal to Include PepsiCo as Guarantor for Lee Way, filed June 23, 1988 41

M. Brief in Opposition to Claimant's Motion for Order on Appeal to Include PepsiCo, filed July 28, 1988 44

N. PepsiCo's Petition for Review, filed August 22, 1988 58

O. U.S. Const. amend. XIV, § 1 67

P. Okla. Stat. tit. 12, § 2004(C) (1989) 68

Q. Okla. Stat. tit. 12, § 2015(A) (1984) 73

R. Okla. Stat. tit. 12, § 2019(A) (1984) 74

S. Okla. Stat. tit. 85, ch. 4, App. Rule 11 (1981) . 75

T. Okla. Stat. tit. 85, ch. 4, App. Rule 13 (1987) . 77

U. Subsidiaries and Affiliates of PepsiCo, Inc. ... 78

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

PEPSICO, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 71,575
	)	
CLINTON SHARP, and THE WORKERS' COMPENSATION COURT,	)	
	)	
Claimant-Respondent,	)	
	)	
and	)	
	)	
CLINTON SHARP,	)	
	)	
Claimant-Petitioner,	)	
	)	
v.	)	No. 71,618
	)	
PEPSICO, INC., and THE WORKERS' COMPENSATION COURT,	)	[FOR OFFICIAL PUBLICATION]
	)	
Respondent.	)	

PROCEEDING TO REVIEW DECISION BY APPELLATE PANEL OF WORKERS' COMPENSATION COURT.

Proceeding to review order and corrected order of appellate panel of Workers' Compensation Court which added

guarantor as party respondent co-obligor of workers' compensation liabilities of its bankrupt subsidiary and refused to award claimant attorney fees based on "frivolous" proceedings by guarantor before the appellate panel. Both guarantor and claimant seek review.

ORDER AND CORRECTED ORDER
OF APPELLATE PANEL SUSTAINED.

Ben A. Goff, P.C.
and
Frank E. Walta
Oklahoma City, Oklahoma

For Petitioner
PepsiCo, Inc.

Of Counsel:

McKinney Stringer & Webster
By: Charles C. Green
Oklahoma City, Oklahoma

Schiff Hardin & Waite
By: Roger Pascal
Joseph R. Lundy
and
Ann Rae Heitland
Chicago, Illinois

Grennan & Faulkner
By: Jim Grennan
Oklahoma City, Oklahoma

For Claimant
Clinton Sharp

Of Counsel:

Marcia Davis
Oklahoma City, Oklahoma

E. W. Keller
Oklahoma City, Oklahoma

Thomas Woody
Oklahoma City, Oklahoma

HODGES, J.

This proceeding reviews an order of the Workers' Compensation Court en banc which affirmed the trial tribunal's order certifying Clinton Sharp's (claimant) claim against his employer, Lee Way Motor Freight, Inc. (Lee Way), and added PepsiCo, Inc. (PepsiCo), as guarantor for payment of benefits following Lee Way's default. In addition, claimant seeks review of a corrected order denying his request for attorney fees based on the "frivolity" of PepsiCo's proceeding before the Workers' Compensation Court en banc. The two proceedings are consolidated for the purpose of written opinion only.

Six issues are presented: (1) Does PepsiCo's guaranty of Lee Way's workers' compensation liabilities make it a co-obligor for claims which arose during Lee Way's own-risk employer period but were not awarded until after PepsiCo's revocation of the agreement? (2) Did PepsiCo receive proper notice in this action so as to satisfy due process requirements and invoke the jurisdiction of the Workers' Compensation Court? (3) Did the Workers' Compensation Court en banc have authority to add PepsiCo as a party respondent? (4) Was claimant's action brought within the time allowed by the applicable statute of limitations? (5) Is the proper date for accrual of statutorily imposed interest on a workers' compensation claim the date of the compensation award rather than the date a guarantor's liability is invoked? (6) Did the Workers' Compensation Court en banc correctly refuse to grant claimant's request for attorney fees based on the "frivolity" of PepsiCo's appeal? We answer all these questions in the affirmative and sustain both the order and the corrected order of the Workers' Compensation Court en banc.

To understand the context of the issues in this appeal, certain background facts must be appreciated. Lee Way

became a wholly-owned subsidiary of PepsiCo on August 18, 1976, and began operating as an own-risk employer.[1] In early June, 1984, PepsiCo announced it had entered an agreement to sell Lee Way to Commercial Lovelace Motor Freight, Inc. (C&L). On June 8, 1984, the Administrator of the Workers' Compensation Court informed Lee Way that, to continue its status as an own-risk employer, PepsiCo had thirty days to state in writing that it would be "fully responsible for any liabilities that Lee Way may incur under the Workers' Compensation Act."[2] When no guaranty agreement was tendered, the court administrator revoked Lee Way's own-risk permit on July 9, 1984. PepsiCo then submitted its agreement on July 27, 1984, which guaranteed Lee Way's workers' compensation liabilities and induced the administrator to withdraw the revocation of Lee Way's own-risk permit. Lee Way was sold to C&L on August 6, 1984, and PepsiCo revoked its guaranty on August 29th.

---

[1] An employer becomes an own-risk carrier by furnishing proof to the Administrator of the Workers' Compensation Court of the employer's ability to pay compensation. Okla. Stat. tit. 85, § 61(d) (1981 & Supp. 1987).

[2] The requirement of full responsibility comes from the following rule:

> Any subdivision or subsidiary of any employer, which has already been authorized by the court to self-insure, may likewise be separately authorized to self-insure PROVIDED that the subdivision or subsidiary independently meets all of the above qualifications. If the subdivision or subsidiary does not independently meet these qualifications, it may be separately authorized to self-insure PROVIDED that the parent or principal employer guarantees in writing that it will be fully responsible for any liabilities that its subdivision or subsidiary may incur under the Workers' Compensation Act.

Okla. Stat. tit. 85, chap. 4, app., Rule 35 (1981). This rule now appears as Rule 2 of the Rules of the Administrator of the Workers' Compensation Court.

After its sale, Lee Way ceased operations on November 17, 1984. Lee Way was then merged with C&L on February 27, 1985, to form Lee Way Holding Company. This corporate successor to Lee Way filed for chapter 11 bankruptcy reorganization on March 7, 1985.

At about the time Lee Way ceased operations, it also ceased payment of workers' compensation benefits to injured employees. Workers began seeking enforcement of these benefits against PepsiCo as guarantor of Lee Way's workers' compensation liabilities. Proceedings before the Workers' Compensation Court en banc, challenging trial tribunal decisions construing the guaranty, were stayed until the scope of PepsiCo's guaranty was determined in *Lum v. Lee Way Motor Freight, Inc.*, 757 P.2d 810 (Okla. 1987).

In the present proceeding, Sharp's claim arose from a work-related back injury sustained on December 21, 1983, while he was employed by Lee Way. He began receiving benefits from Lee Way on January 2, 1984, and filed a claim for compensation on the first day of March, 1984. On November 16, 1984, claimant filed a form 9 Motion to Set for Hearing seeking to certify, for enforcement in district court, unpaid benefits against Lee Way as employer and against PepsiCo as guarantor. A hearing was originally set for January 22, 1985, but postponed in order to give PepsiCo notice.

At the February 25, 1985, hearing PepsiCo appeared represented by the same attorney who was representing Lee Way. The parties agreed by stipulation to claimant's injury, the applicable rates, and that benefits were owing from December 9, 1984. As the trial tribunal observed at the hearing, "the only real issue in this case is should this Order be written against Lee Way or against Lee Way and PepsiCo." The tribunal's order of March 26, 1985, was written only against Lee Way.

Lee Way filed a Notice of Appeal with the Workers' Compensation Court en banc claiming the trial tribunal's order was contrary to law and contrary to the evidence. All proceedings were then stayed until this Court's decision in *Lum* was handed down on November 10, 1987. One week later, PepsiCo filed its "answer" naming itself as a "respondent". Rehearing of the *Lum* decision was denied on June 21, 1988. The next day, claimant filed his motion to set the cause for hearing before the Workers' Compensation Court en banc and to include PepsiCo as guarantor in a certification order.

After a hearing on July 29, 1988, the Workers' Compensation Court en banc issued an order on August 2, 1988, adding PepsiCo as a party respondent guarantor based on the *Lum* decision. PepsiCo was also held responsible for interest from the date of the award against Lee Way. On August 5, 1988, a corrected order refused to grant claimant's attorney fees based on the "frivolity" of PepsiCo's appeal. The order and corrected order are the subjects of this proceeding.

I.

PepsiCo urges error in the court en banc's holding that, based on the *Lum* decision, PepsiCo's guaranty of Lee Way's workers' compensation liabilities makes it a co-obligor for claims arising during Lee Way's own-risk permit but not awarded until after PepsiCo's revocation of the agreement. We hold that the general principles of law stated in *Lum* govern the enforceability of PepsiCo's guaranty and that the Workers' Compensation Court properly held PepsiCo responsible for payment of those awards.

The *Lum* decision held that PepsiCo's guaranty was given to satisfy Lee Way's statutory liability for workers'

compensation awards by stepping into the shoes of its subsidiary. 757 P.2d at 817. *Lum* observed that "[o]ne who chooses to stand as a guarantor of an obligation defined by law *may not be allowed to guarantee less than the full extent of the statutorily-imposed liability.*" *Id.* at 816. PepsiCo was held to have "assume[d] the continuing obligation to pay awards granted during the life of [Lee Way's own-risk] permit." *Id.* at 819. This construction of the guaranty provided protection to workers "equivalent to that afforded employees covered by workers' compensation insurance issued by independent insurance carriers."[3]

PepsiCo now argues that *Lum* required payment only of awards *granted* during the life of Lee Way's own risk permit, not claims based on injuries during that period which were not adjudicated until after PepsiCo revoked its guaranty. This assertion clearly conflicts with *Lum's* holding that PepsiCo stepped into Lee Way's shoes and assumed its subsidiary's own-risk obligations.

PepsiCo has misinterpreted *Lum's* observation that "[t]here is no dispute that the PepsiCo guaranty was continuing and capable of being revoked by the guarantor so that claims arising after its revocation would not be within its terms." *Id.* at 815. The passage does not support PepsiCo's argument that claims *adjudicated* after it revoked its guaranty are not within the scope of that agreement. A workers' compensation claim arises at the time of injury, not when the claim is actually litigated.

---

[3] *Id.* The *Lum* holding was recently reaffirmed in Lee Way Motor Freight, Inc. v. Welch, 764 P.2d 191 (Okla. 1988). *Welch* also gave retrospective effect to PepsiCo's guaranty, making it responsible for awards granted during Lee Way's own-risk permit, including awards for injuries sustained before the guaranty agreement was submitted to the Workers' Compensation Court.

See Maryland Casualty Co. v. Hankins, 532 P.2d 426, 429 (Okla. 1975). PepsiCo's obligations under its statutory undertaking of liability included the payment of awards for injuries that occurred during Lee Way's own-risk permit but were not adjudicated until after PepsiCo revoked its guaranty.

II.

PepsiCo maintains it never received proper notice and service of process in this action resulting in a denial of due process and a lack of jurisdiction by the Workers' Compensation Court. It is not notice of the certification hearing that PepsiCo challenges; it was given notice of that hearing and appeared to argue it lacked responsibility for claimant's award despite its guaranty. Rather, PepsiCo believes it was entitled to receive either a form 3 notice of claim, as was sent to Lee Way, or a summons and petition stating a claim *against PepsiCo* for workers' compensation benefits.

The version of Workers' Compensation Court Rule 13 in effect at the time required that when a claim was filed, a notice of claim "shall be mailed by the Court to the employer and the insurance carrier."[4] PepsiCo does not dispute the fact that Lee Way received a notice of Sharp's claim. Instead, PepsiCo cites *Lum* to assert it was entitled to the same notice as Lee Way in whose shoes it stands.

PepsiCo, however, was neither Sharp's employer nor an insurance carrier. It guaranteed the workers' compensa-

[4] Okla. Stat. tit. 85, chap. 4, app., Rule 13 (1981). The rule was amended, effective June 1, 1987, to require notice to "the employer *or* the insurance carrier."

tion liabilities of its wholly owned subsidiary so that Lee Way could remain an own-risk employer. Rule 13 was inapplicable to PepsiCo as guarantor.[5]

In the alternative, PepsiCo argues that it did not receive proper notice and service of process under the Oklahoma Code of Civil Procedure, Okla. Stat. tit. 12 (1981). Again, it is not notice of the certification hearing that PepsiCo challenges. It is its absence from the proceeding against Lee Way that PepsiCo charges was improper. *Wilsey, Bennett Co. v. Grant,* 632 P.2d 382 (Okla. 1981), is cited in support of this proposition.

Grant held a workers' compensation claim was ineffective against a party so deficiently named on the claim form as to prevent the trial court staff from sending notice to the correct entity. The decision reversed the Court of Appeals' holding that the timely filing of a claim against the deficiently named uninsured immediate employer tolled the statute of limitations period as to both the immediate employer and the statutory employer who was secondarily liable. The misnamed party and the proper party were not subsidiaries or alter-egos of the other. *Grant* rejected the notion that the parties stood identified by operation of law and were automatically joined as litigants though not timely identified on the face of the worker's claim.

The instant facts present a very different situation in which the only entity initially liable was Lee Way, Sharp's own-risk employer. PepsiCo is a guarantor, not an em-

---

[5] Even if Rule 13 applied to PepsiCo, the rule was satisfied by notice to Lee Way, a subsidiary wholly owned by PepsiCo. This conclusion is consistent with the holding that notice to an employer of a workers' compensation claim is notice to an employer's insurance carrier. *Hankins,* 532 P.2d at 429.

ployer. It became immediately liable under the guaranty only when Lee Way failed to pay Sharp's workers' compensation award.[6]

PepsiCo was not entitled to notice until its liability was triggered by Lee Way's default. Notice of the certification hearing was provided to PepsiCo by certified mail.[7] Because PepsiCo was given notice of the hearing and an opportunity to be heard, due process requirements were satisfied and the jurisdiction of the Workers' Compensation Court was properly invoked. *See Cate v. Archon Oil Co., Inc.*, 695 P.2d 1352, 1356 (Okla. 1985).

III.

PepsiCo next maintains that the en banc panel of the Workers' Compensation Court lacked authority to include PepsiCo as guarantor in the certification order after the trial tribunal refused to do so. Specifically, PepsiCo maintains the panel usurped the role of the trial tribunal by adding PepsiCo as a party respondent guarantor.

The issue of PepsiCo's inclusion in a certification order was addressed in *Lum*, 757 P.2d 810, and *Welch*, 764 P.2d 191. In both cases, as in the instant case, PepsiCo's guaranty was held to include the claimants' awards. As *Lum* explained, "[t]he Workers' Compensation Court has the

---

[6] Guaranty law provides that "[a] guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice." Okla. Stat. tit. 15, § 332 (1981).

[7] Although not the basis for determination of this issue, it should be noted that PepsiCo appeared at the hearing after filing its "answer" in which it called itself "respondent." At the hearing, PepsiCo's counsel stated he represented both Lee Way and PepsiCo and that PepsiCo had been served.

power and the duty to determine which entity must bear the responsibility for payment of its awards." 757 P.2d at 820 n.35. *Lum* held it was error for the Workers' Compensation Court *not* to include PepsiCo in its certification order. *Welch* reaffirmed that decision by holding that the Workers' Compensation Court did not err in adding PepsiCo "as an additional party codebtor" in its certification order. 764 P.2d at 196.

PepsiCo argues that its inclusion in a certification order must occur at the trial level because the en banc panel is an appellate court. However, in *Parks v. Norman Municipal Hospital*, 684 P.2d 548 (Okla. 1984), it was noted that workers' compensation en banc review provides an intra-court review scheme. This scheme "was intended not to afford two layers of appellate process . . . but rather to implement a two-tier decisional system *within* the trial tribunal with but a single appellate remedy in this court (or now in the Court of Appeals)." *Id.* at 551 (footnotes omitted). The en banc panel could have directed the trial tribunal to include PepsiCo in the certification order or add PepsiCo at the en banc level as it chose to do.

IV.

In an argument related to the notice and service of process issue, PepsiCo asserts the injured worker failed to file a claim against *PepsiCo* within the one-year limitation period in effect at that time.[8] PepsiCo cites *Grant's* observation that "[t]he statute [of limitations] makes *no* distinction between those who bear primary liability and those who may be held secondarily liable." 632 P.2d at 384-85.

---

[8] *See* Okla. Stat. tit. 85, § 43 (1981). The statute was amended and now provides a two-year limitation period.

This observation, however, refers to liability among employers.

Again, PepsiCo has failed to appreciate its status as guarantor rather than employer. At the time Sharp filed a claim against Lee Way, PepsiCo was not yet responsible for payment of compensation. It was not until Lee Way's default that the guarantor's liability was triggered.

Sharp filed his claim against Lee Way within the limitation period. His claim was adjudicated and an award was entered against Lee Way. PepsiCo's liability was invoked pursuant to its guaranty agreement only because Lee Way failed to pay the award. The statute of limitations was satisfied by Sharp's timely claim against Lee Way.

V.

The next issue concerns the proper date from which statutorily imposed interest should be assessed. PepsiCo urges the statutory interest should run only from August 2, 1988, the date its liability under the guaranty was invoked and it was included in the en banc panel's order. Claimant argues interest should run from March 26, 1985, the date of Sharp's award against Lee Way.

As noted in the *Lum* decision, PepsiCo guaranteed "*the full extent of the statutorily imposed liability.*" 757 P.2d at 816. The Workers' Compensation Act provides:

> Any *compensation awarded* and all payments thereof directed to be made by order of the Court shall bear interest at the rate of eighteen percent (18%) per year from the *date ordered paid by the Court* until the date of satisfaction.

Okla. Stat. tit. 85, § 42 (Supp. 1984) (emphasis added). The compensation ordered paid by the court was the award against Lee Way on March 26, 1985. Because the award

was unenforceable against bankrupt Lee Way, PepsiCo stepped into Lee Way's shoes and assumed the obligation to pay the award including the statutory interest that has accrued since March 26, 1985.

VI.

Claimant has sought review of the en banc panel's refusal to grant him attorney fees based on the "frivolity" of PepsiCo's proceeding before the Workers' Compensation Court. Claimant also urges a sanction and penalty of 10% of PepsiCo's net worth.

The Workers' Compensation Act provides for payment of a claimant's legal services from the compensation award. However, the Act also provides:

> If the Court before which any proceedings for compensation or concerning an award of compensation have been brought under the Workers' Compensation Act, determines that such proceedings have not been brought on a reasonable ground, . . . the Court shall assess the total cost of the proceedings on the party who has brought them. . . .

Okla. Stat. tit. 85, § 30 (1981).

Although PepsiCo did not prevail, it cannot be said that the proceedings before the en banc panel were not brought on a reasonable ground. The panel correctly denied claimant's request for attorney fees.

ORDER AND CORRECTED ORDER OF APPELLATE PANEL SUSTAINED.

CONCUR: HARGRAVE, C.J., HODGES, LAVENDER, SIMMS, DOOLIN, SUMMERS, J.J.

CONCUR IN PART, DISSENT IN PART: OPALA, V.C.J. and WILSON, J.

RECUSED: KAUGER, J.

OPALA, V.C.J., Concurring in Part and Dissenting in Part.

I would allow the victorious claimant a counsel-fee award for appeal-related services. 20 O.S. Supp. 1982 § 15.1.

APPENDIX B

[Filed March 28, 1985]

BEFORE THE
WORKERS' COMPENSATION COURT
OF THE STATE OF OKLAHOMA

In re claim of:

CLINTON SHARP, Claimant,	Court No. 84-3754-K
LEE WAY MOTOR FREIGHT, Respondent,	Claimant's Social Security No. 045-22-4762
OWN RISK, Ins. Carrier,	

ORDER

Now on this 26TH day of MARCH, 1985, this cause comes on for consideration pursuant to regular assignment and hearing on FEBRUARY 25, 1985, before Judge JACQUE JEFFRIES BRAWNER, at OKLAHOMA CITY, Oklahoma, at which time claimant appeared and by counsel, JIM GRENNAN and respondent appeared by counsel, A. M. MORRISON.

The Court, having considered the evidence and records on file, and being well and fully advised in the premises FINDS AND ORDERS AS FOLLOWS:

-1-

THAT on DECEMBER 21, 1983, claimant was employed by the above named respondent and such employment was subject to and covered by the provisions of the Workers' Compensation Act of the State of Oklahoma; and on said date claimant sustained an accidental personal injury to the BACK arising out of and in the course of claimant's employment.

-2-

THAT at the time of said injury, claimant's wages were sufficient to establish the rates of compensation at $212.00 per week for temporary total disabililty [sic] compensation and $159.00 per week for permanent partial disability; as a result of said injury, claimant has been temporarily totally disabled from JANUARY 1, 1984; and is still temporarily totally disabled and in need of further medical treatment, care and attention, and is entitled to compensation for such disability to be paid as follows: Compensation has been paid from JANUARY 1, 1984 to DECEMBER 8, 1984; Compensation is due at the rate of $212.00 per week from DECEMBER 8, 1984 to date, a period of 15 weeks and 3 days in the amount of $3,286.00 (plus 10 per cent interest penalty of $328.60) for the sum of $3,614.60; and compensation shall continue for and during claimant's period of temporary total disability, not to exceed 300 weeks.

-3-

THAT respondent or insurance carrier shall furnish claimant with necessary medical treatment, care and attention for correction of claimant's condition brought about by said injury by a competent physician to be selected by claimant; and respondent or insurance carrier shall pay to claimant the amount of compensation which has accrued to date, as shown above, and continue the payment of compensation to claimant at the rate of $212.00 per week for and during claimant's period of temporary total disability, not to exceed 300 weeks.

-4-

THAT determination of permanent disability, if any, sustained by claimant as a result of said injury is reserved for future hearing.

-5-

THAT claimant's attorney shall be paid the sum of $361.46 from the accrued portion of the award herein and every 10th weekly payment of $212.00 as a reasonable fee herein; within 20 days from the date of filing of this order, respondent or insurance carrier shall file herein proper receipt evidencing compliance with this order.

BY ORDER OF:

/s/ JACQUE JEFFRIES BRAWNER
Jacque Jeffries Brawner, Judge

bb/ge
cc: Jim Grennan
A. M. Morrison

APPENDIX C

[Filed August 2, 1988]

BEFORE THE
WORKERS' COMPENSATION COURT
OF THE STATE OF OKLAHOMA

In re claim of:	
CLINTON SHARP Claimant	Court No. 84-3754K
LEE WAY MOTOR FREIGHT, INC. and PEPSICO, INC. Respondent	Claimant's Social Security No. 045-22-4762
OWN RISK Ins. Carrier	

ORDER ON APPEAL

On JULY 29, 1988, this cause came on for hearing before the undersigned Judges, sitting as a panel, on appeal from the order of the Trial Judge heretofore entered on MARCH 28, 1985.

After reviewing the record in this case, and being fully informed in the premises, said Judges find that the order of the Trial Judge heretofore entered in this case on MARCH 28, 1985, was not against the clear weight of

evidence nor contrary to law and the same is hereby AFFIRMED based upon the following findings:

-I-

That PEPSICO, INC. by the execution of its guaranty has stepped into the shoes of LEE WAY MOTOR FREIGHT, INC. and is hereby joined as a party respondent following the law decided in the case *Lum v. Lee Way Motor Freight, Inc.*, No. 64,213, slip op. (Sup. Ct. of Okl. November 10, 1987).

-II-

That PEPSICO, INC. is responsible for the payment of this claim which arose prior to the revocation of PEPSICO'S guaranty, see Lum [sic], *supra.* The pivotal date in determining the applicability of PEPSICO'S guaranty is the date the claim arose, not the date of the Court's order. The retrospective application of the guaranty seen in the *Lum* case is equally appropriate in the instant case.

Respondent or insurance carrier is hereby ordered to pay interest on the accrued portion of said award at the rate of 18% per year from the date of the award.

Upon adoption of the foregoing order on the 29TH day of JULY, 1988, the roll was called and the following voted:

JUDGE CHARLES L. CASHION, AYE
/s/ CHARLES L. CASHION

JUDGE JERRY L. SALYER, AYE
/s/ JERRY L. SALYER

JUDGE OZELLA M. WILLIS, AYE
/s/ OZELLA M. WILLIS

ge
cc: Jim Grennan
David Roberts
Mike Coker
Ben Goff

APPENDIX D

[Filed August 8, 1988]

BEFORE THE
WORKERS' COMPENSATION COURT
OF THE STATE OF OKLAHOMA

In re claim of:	
CLINTON SHARP	
Claimant	Court No. 84-3754K
LEE WAY MOTOR FREIGHT, INC. and PEPSICO, INC.	
Respondent	Claimant's Social Security No. 045-22-4762
OWN RISK	
Ins. Carrier	

CORRECTED ORDER ON APPEAL

Now on this 5TH day of AUGUST, 1988, the Court finds upon further consideration that all issues raised before the En Banc Tribunal on JULY 29, 1988 were not answered in the Order on Appeal entered herein on AUGUST 2, 1988; and that therefore said order is modified to include the following:

-III-

THAT claimant's request for attorney fees based on the "frivolity" of respondent's appeal is hereby denied.

This order corrects the order entered herein on JULY 29, 1988, and all other provisions of said order shall remain in full force and effect as the order of this Court.

Upon adoption of the foregoing order on the 5TH day of AUGUST, 1988, the roll was called and the following voted:

JUDGE CHARLES L. CASHION, AYE
/s/ CHARLES L. CASHION

JUDGE JERRY L. SALYER, AYE
/s/ JERRY L. SALYER

JUDGE OZELLA M. WILLIS, AYE
/s/ OZELLA M. WILLIS

ge

cc: Jim Grennan
David Roberts
Mike Coker
Ben Goff

APPENDIX E

[Filed September 20, 1989]

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Wednesday, September 20, 1989

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

69,905 William Spencer v. City of Bartlesville and The Workers' Compensation Court.
Certiorari denied.
CONCUR: Hargrave, C.J., Hodges, Lavender, Doolin, Wilson, Kauger, Summers, JJ.
DISSENT: Opala, V.C.J., Simms, J.

70,024 In the Matter of the Income Tax Protest of Flint Resources Company. Flint Resources Company v. State of Oklahoma ex rel. Oklahoma Tax Commission.
Rehearing denied.
CONCUR: Hargrave, C.J., Opala, V.C.J., Lavender, Simms, Doolin, Kauger, Summers, JJ.

70,539 Wells Fargo Credit Corporation v. Joseph R. Ziegler and Joyce R. Ziegler.
Rehearing denied.
All Justices concur.

70,895 Oklatex Corporation and National Union Fire Insurance Company v. Charles Douglas Mitchell and The Workers' Compensation Court.
Certiorari denied.
CONCUR: Opala, V.C.J., Lavender, Simms, Doolin, Wilson, Kauger, Summers, JJ.
DISSENT: Hargrave, C.J., Hodges, J.

71,575 PepsiCo, Inc. v. Clinton Sharp and The Workers' Compensation Court.
Rehearing denied.
CONCUR: Hargrave, C.J., Opala, V.C.J., Hodges, Lavender, Simms, Doolin, Wilson, Summers, JJ.
RECUSED: Kauger, J.

71,724 Oklahoma Department of Commerce v. Merit Protection Commission.
Rehearing denied.
CONCUR: Hargrave, C.J., Lavender, Simms, Doolin, Summers, JJ.
DISSENT: Opala, V.C.J., Hodges, Wilson, JJ.
RECUSED: Kauger, J.

71,816 Dwight Grady v. Jeff Knight, Bob Siler, Eugene Holleman and Gary Gessner etc. and Independent School District # 3, Lincoln County.
Rehearing denied.
All Justices concur.

72,570 Clifton H. Scott, State Auditor and Inspector and Earl Westmoreland and Harry Westmoreland v. Lowell R. Burgess, Judge of the District Court of Pushmataha County.
Rehearing denied.
CONCUR: Hargrave, C.J., Opala, V.C.J., Lavender, Simms, Doolin, Wilson, Kauger, Summers, JJ.

/s/ RUDOLPH HARGRAVE
Chief Justice

APPENDIX F

[Filed October 16, 1989]

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

PEPSICO, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 71,575
	)	
CLINTON SHARP,	)	
	)	
Respondent.	)	

ORDER

By published opinion of this Court dated July 18, 1989, the orders from which these proceedings for review were taken were sustained, and rehearing was denied by this Court on September 20, 1989. Pursuant to Supreme Court Rule 31, claimant Clinton Sharp has sought judgment against the surety on the appeal bond.

The award of the Workers' Compensation Court was superseded by a bond in which PepsiCo, Inc. is the principal and U.S. Fidelity & Guaranty Co. of Maryland is the surety. The conditions of the bond have become obligatory.

NOW, THEREFORE, the claimant Clinton Sharp is granted judgment against U.S. Fidelity & Guaranty Co. of Maryland for the adjudicated compensation award in the whole

amount of that award, together with recoverable interest and costs, herein and below, but not to exceed the penal sum of the bond, which is $70,000.00. This Court notes claimant's motion to determine the total amount due on the compensation award; that matter should be addressed to the Workers' Compensation Court.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 16TH DAY OF OCTOBER, 1989.

/s/ RUDOLPH HARGRAVE
Chief Justice

HARGRAVE, C.J., OPALA, V.C.J., HODGES, LAVENDER, SIMMS, DOOLIN, WILSON and SUMMERS, JJ. — Concur
KAUGER, J. — Recused

APPENDIX G

[Received March 8, 1984]

FORM NO. 3

WORKERS' COMPENSATION COURT
JIM THORPE BUILDING
OKLAHOMA CITY, OK 73105

EMPLOYEE'S FIRST NOTICE OF ACCIDENTAL INJURY AND CLAIM FOR COMPENSATION

Court Claim Number *84-3754K*

In re claim of:
CLINTON A. SHARP
Name of Claimant (Injured Employee)

LEE WAY MOTOR FREIGHT, INC.
Name of Employer

OWN RISK
Name of Insurance Carrier (To Be Added By Court)

EMPLOYEE

Name *SHARP, CLINTON A.*
Social Security # *045 22 4762*

Address *2804 Clinton Terrace,*
Del City, Oklahoma 73115

Telephone *670 5966* Age *54* Sex *male*

Average weekly wage $ *700.00* Was your employment agreement made in Oklahoma? *yes*

INJURY

Date of accident *12/21/83* Time *6:00 p.m.*

Place: City *Baltimore* County ____ State *Maryland*

Last day worked after injury *1/1/84* Were you paid full wages that day? *yes*

Have you returned to work? *no* If so, on what date? *not*

Treating physician *Dr. Sam Cornelius, D.O., Dr. John Hughes, D.O., MWC Hospital, and Meridian Ind. Clinic*

Nature of injury *lower back with pain into both hips*

List parts of body injured *lower back*

How did the accident occur? *I was having to stand up to pull on the steering wheel to turn the tractor-trailer and in so pulling I got a catch and pain in my low back, but continued to work and on 12/31/84 twisted my back again while sitting on the passenger seat of the tractor, bring my feet in from outside.*

Name object or substance which directly injured you *straining*

EMPLOYER

Name *Lee Way Motor Freight, Inc.* Telephone ____

Address *P.O. Box 12750, Oklahoma City, Oklahoma 73157*

Were you at the time of this last injury a physically impaired person on account of a pre-existing disability as a result of accident, disease, birth, military or other cause? If the answer is "Yes", then you may be entitled to additional benefits from the Special Indemnity Fund. *no* If so, please describe the impairment and give the dates of the injuries and of any court orders.

You are required to elect where you want any future hearing to be held regarding this claim. Hearings must be in Oklahoma in ONE of the counties you choose UNLESS the parties mutually agree upon a different location or the Court orders otherwise. You should make your selection by writing in the name of the county you prefer on one of the blank spaces below:

_X_ a) county of your residence AT THE TIME OF THE ACCIDENT,

____b) county in which the accident occurred,
____c) county in which employer's principal place of business is located,
____d) county in which the contract of employment was entered. (This last county is available ONLY to non-resident claimants who were injured outside Okla.)

I declare under penalty of perjury that I have examined this notice and claim, and all statements contained herein, and to the best of my knowledge and belief, they are true, correct and complete.

Signed this *1st* day of *March* 19*84*.
/s/ *CLINTON A. SHARP*

COMPLETE THIS FORM IN TRIPLICATE AND MAIL DIRECTLY TO THE COURT. THE COURT WILL THEN SEND A COPY EITHER TO YOUR EMPLOYER OR TO ITS INSURANCE CARRIER.

Name of claimant's attorney if represented:
Name *Jim Grennan*
Address *2000 Classen, Suite 120 S.*
Oklahoma City, Okla. 73106
Telephone *525 8606*

NOTICE: IF YOU HAVE NOT ALREADY NOTIFIED YOUR EMPLOYER OF THIS ACCIDENTAL INJURY, DO SO AT ONCE. NOTIFICATION WITHIN 30 DAYS IS REQUIRED BY LAW, AND FAILURE TO GIVE SUCH NOTICE MAY RESULT IN BARRING YOUR CLAIM FOR ANY BENEFITS UNDER THE WORKERS' COMPENSATION ACT.

Do you want the court to send you information regarding rehabilitative services? _____

APPENDIX H

[Received November 20, 1984]

FORM NO. 9

WORKERS' COMPENSATION COURT
Jim Thorpe Building
OKLAHOMA CITY, OK 73105

MOTION OF CLAIMANT TO SET FOR HEARING
Court Claim Number *84-3754-K*
Claimant's Social Security No. *045 22 4762*

In re claim of:
CLINTON A. SHARP
Full name of claimant (injured employee)

LEE WAY MOTOR FREIGHT, INC. & PEPSICO, INC., AS GUARANTOR
Name of Employer or Respondent

OWN RISK AND GUARANTOR
Name of Employer's Insurance Carrier

Claimant respectfully requests that the captioned cause be set for hearing at the earliest available docket. Claimant states:

1. Issues to be tried: (Circle all applicable issues below.)
   a. Temporary disability from *1-2-84* to *not exceed 300 weeks*
   and Medical treatment from *1-2-84* to *no longer needed.*
   b. Permanent disability
   c. Motion to commute.
   d. Motion to reopen on change of condition.
   e. Form 19 proceeding.
   f. Liability of Special Indemnity Fund.
   g. Other (Specify):_____

2. Indicate any material amendments that will be offered to the previously filed Form 3: *NONE*

3. List the names of all witnesses who may be called by claimant at trial. The names of any additional witnesses must be submitted to the court and respondent no less than five (5) days prior to trial.

The Claimant
Dr. Henry J. Freede (by report)
Respondent's witnesses

4. Claimant hereby certifies that a copy of the medical report written by Dr. *Henry J. Freede* and dated *August 22, 1984* was attached to a copy of this Motion and mailed to respondent on *November 16, 1984*. (Identify on a separate attached sheet any other written medical report or medical evidence which claimant may offer at trial and likewise certify when same was mailed to respondent.)

	Yes	No
5. Will claimant consider the case submitted at the conclusion of the hearing?	*x*	___
6. Will this case take an unusual amount of time to try?	___	*x*

7. The parties hereto have mutually agreed that the hearings may be held in *OKLA. CITY, OK.*

Signed this *16* day of *November, 1984*
/s/ JIM GRENNAN
2000 CLASSEN, 120 S.
OKLAHOMA CITY, OK. 73106
(405) 5258606

cc: *Mr. Albert M. Morrison*
Attorney at Law
1212 N. W. 50th
Oklahoma City, Ok 73118

APPENDIX I

[Filed January 9, 1985]

WORKERS' COMPENSATION COURT
JIM THORPE BUILDING
2101 NORTH LINCOLN
OKLAHOMA CITY, OKLAHOMA 73105

NOTICE OF TRIAL DATE

YOU WILL TAKE NOTICE THAT THE FOLLOWING CASES WILL BE TRIED BEFORE THE ASSIGNED JUDGE AT THE DESIGNATED TIME, OR AS SOON THEREAFTER AS THEY MAY BE REACHED.

OKLAHOMA CITY, OKLAHOMA
JIM THORPE BUILDING

JUDGE BRAWNER — TUES. JANUARY 22, 1985
9:30 AM

83-14144-H MOTION TO CERTIFY JOHN LEWIS CHILDRESS LEW GRAVITT	VS	LEE WAY MOTOR FREIGHT OWN RISK JOHN OLDFIELD SPEC FUND
83-15917-A SPEC FUND WILMA M. LEWIS RICHARD BELL	VS	SPEC INDEMNITY FUND ONLY
84-2714-A SPEC FUND EDWARD ROSS JAMES MCCRIGHT	VS	SPEC INDEMNITY FUND ONLY

84-10614-X
PPD

JOHNNY BELL WALLACE	VS	LEE WAY MOTOR
THOMAS WOODY		FREIGHT
		OWN RISK
		MIKE COKER
		SPEC FUND

83-17652-H
SPEC FUND

ALFRED WAYNE DEAN	VS	SPEC INDEMNITY
WILLIAM VASSAR		FUND ONLY
		GARY BOVA

81-6095-Y
SPEC FUND

RICKY ALLEN	VS	SPEC INDEMNITY
LEW GRAVITT		FUND ONLY
		ROBERT HIGHSAW

84-12306-L
TTD, MED & MOTION TO CERTIFY

LEAM J STARKS	VS	LEE WAY MOTOR
THOMAS WOODY		FREIGHT
		OWN RISK
		AL MORRISON
		SPEC FUND

84-16284-F
TTD & MEDICAL

SAMMY C BROWNING	VS	BENNY BAGWELL IND.
LYLE MCPHEETERS		TRUCKING
		NO CARD –
		CERT NOTICE
	&/OR	STATE INS FUND
		SPEC FUND

84-14543-X
TTD & MEDICAL

DONNA SUE SULLIVAN	VS	CLYDE BENNETT
NO ATTY –		NO CARD –
CERT NOTICE		CERT NOTICE

84-3754-K
TTD & MEDICAL
CLINTON SHARP VS LEE WAY MOTOR
JIM GRENNAN FREIGHT
OWN RISK –
AL MORRISON
&/OR PEPSICO – CERT
NOTICE

84-13073-X
PPD, COMMUTE & FORM 19 (EXTRA)
VIRGINIA BEESLEY V VS STROMBERG-CARLSON
RICHARD BELL INA
HENRY NICHOLS

APPENDIX J

[Filed February 7, 1985]

WORKERS' COMPENSATION COURT
JIM THORPE BUILDING
2101 NORTH LINCOLN
OKLAHOMA CITY, OKLAHOMA 73105

NOTICE OF TRIAL DATE

YOU WILL TAKE NOTICE THAT THE FOLLOWING CASES WILL BE TRIED BEFORE THE ASSIGNED JUDGE AT THE DESIGNATED TIME, OR AS SOON THEREAFTER AS THEY MAY BE REACHED.

OKLAHOMA CITY, OKLAHOMA
JIM THORPE BUILDING

JUDGE BRAWNER — MON. FEBRUARY 25, 1985 9:30 AM

84-3685-A TTD & PPD DAVID ROBB GEORGE MCCAFFREY	VS &/OR	LEE WAY MOTOR FREIGHT OWN RISK JOHN OLDFIELD PEPSICO – CERT NOTICE
84-18186-R FORM 19 TONY S ORTIZ MIKE LAWTER	VS	HYDRO CONDUIT CORP FIDELITY & CASUALTY JIM CHEEK

84-336-X
OBJECTION TO MOTION TO TERMINATE TTD

JOHN KINGHORN	VS	CARDINAL PAPER CO.
DAVID PRESCOTT		NATIONAL UNION INS
		DAVE ROBERTS

84-1092-L & 84-10555-R
COMMUTE & MOTION TO CERTIFY

PAUL R LANE	VS	LEE WAY MOTOR
THOMAS WOODY		FREIGHT
		OWN RISK
		DAVE ROBERTS
	&/OR	PEPSICO – CERT
		NOTICE

84-3160-R
FORM 19

WILLIAM A FRANKLIN	VS	HINES GARAGE &
WILLIAM VASSAR		EQUIPMENT
		CNA
		JAMES DURANT

84-12527-Y
FORM 19

ALVA R. JUAREZ	VS	PRUITT CONSTRUCTION
MIKE LAWTER		CO.
		SECURITY NATIONAL
		JOHN OLDFIELD

84-3754-K
TTD & MEDICAL

CLINTON SHARP	VS	LEE WAY MOTOR
JIM GRENNAN		FREIGHT
		OWN RISK
		AL MORRISON
	&/OR	PEPSICO – CERT
		NOTICE

83-10320-K
REDETERMINATION OF DEATH BENEFITS
IN THE MATTER OF THE DEATH OF ROBERT E. VINYARD

ELFRIEDE VINYARD	VS	BEDINGFIELD
JERRY CRABB		CONSTRUCTION
KATHY RENUE VINYARD		EQUITY MUTUAL INS
DOUGLAS E VINYARD, MINOR		BRUCE WINSTON
BETTY L VINYARD		
ED CARRIER		

84-5322-A
TTD & MEDICAL (EXTRA)

SHERRY D BRASHEAR	VS	CABLE CAR RENTAL
RODNEY PALMER		MORRISON ASSURANCE CO.
		NOMA GURICH

APPENDIX K

[Received November 18, 1987]

BEFORE THE
WORKERS' COMPENSATION COURT
OF THE STATE OF OKLAHOMA

CLINTON SHARP,	)	
	)	
Claimant,	)	
v.	)	No. 84-3754-K
	)	
LEE WAY MOTOR FREIGHT, and/or PEPSICO, INC.,	)	
	)	
Respondent,	)	SS No. 045-22-4762
	)	
OWN RISK,	)	
	)	
Insurance carrier.	)	

ANSWER

COMES NOW, PepsiCo, Inc., and for its Answer states:

I

That it specifically denies each and every material allegation contained in said claim, except as may be hereafter specifically admitted.

II

PepsiCo, Inc., specifically denies:

a. That the Claimant was employed by the Respondent at the time and place of the alleged accidental injury;

b. That the Claimant received an accidental injury arising out of or in the course of his employment with this Respondent;

c. That the Claimant gave notice of the accident within thirty (30) days from the date of the accident and this failure to notify the Respondent has resulted in prejudice to the Respondent;

d. That the medical treatment given the Claimant was reasonable or necessary for any alleged accidental injury;

e. The Respondent was aware of or authorized any medical treatment;

f. That the Claimant sustained any temporary total disability as a result of the alleged accident; and

g. That Claimant sustained any permanent partial disability as a result of the alleged accident.

AFFIRMATIVE DEFENSES

The Respondent, PepsiCo, Inc., moves to dismiss this claim, as to the Respondent, PepsiCo, Inc., on the following grounds:

a. That the Workers' Compensation Court of the State of Oklahoma is without jurisdiction to hear the above claim;

b. The Respondent, PepsiCo, Inc., has been improperly joined in this action;

c. That PepsiCo, Inc.'s liability in this action, if any, is as a Guarantor and that the Claimant has not exhausted his remedies as against Lee Way Motor Freight, Inc.

d. That Lee Way Motor Freight, Inc., a/k/a Lee Way Holding Company, is the Debtor in Case No. 2-85-00611, filed in the United States Bankruptcy Court, Southern District of Ohio, Eastern Division, seeking reorganization under Chapter 11 of the United States Bankruptcy Act, that this action is stayed by Order of the United States Bankruptcy Court. This action is premature as to PepsiCo, Inc., PepsiCo, Inc., as Guarantor, until such time as it is determined by the United States Bankruptcy Court as to the nature and extent of the liability of Lee Way Motor Freight, Respondent to the Claimant.

e. That PepsiCo, Inc. has not been notified of any application to join it as a Respondent in this case, nor has it been afforded a hearing on this joinder and is therefore, not a proper party to this action.

f. The Respondent, PepsiCo, Inc., has no obligations to this Claimant under its Guarantee.

g. That this action, as to the Guarantor, PepsiCo, Inc., is barred by the applicable statute of limitations.

h. That this Court lacks subject matter jurisdiction;

i. That this Court lacks jurisdiction over the person of PepsiCo, Inc., that there has been no service of the claim upon the Guarantor, PepsiCo, Inc., therefore, there is an insufficiency of process, depriving this court of jurisdiction.

Respectfully submitted,

/s/ MARY ELLEN LEE
BEN A. GOFF, OBA #3424
MARY ELLEN LEE, OBA #11664
1212 Northwest 50th Street
Oklahoma City, OK 73118
(405) 843-8401

ATTORNEY FOR PEPSICO, INC.

CERTIFICATE OF MAILING

I hereby certify that on this *17th* day of November, 1987, a true and correct copy of the above and foregoing Answer mailed, postage prepaid to: Fred Luper, Trustee for Lee Way Holding Company, 50 West Broad Street, Suite 1200, Columbus, Ohio; and Jim Grennan, Attorney for Claimant, 200 Classen Blvd., Suite 120-S, Oklahoma City, Oklahoma 73106.

/s/ MARY ELLEN LEE
MARY ELLEN LEE

Leave granted to file out of time.

DONE this *17* day of November, 1987.

/s/ _____
INDUSTRIAL COURT JUDGE

APPENDIX L

BEFORE THE
WORKERS' COMPENSATION COURT
OF THE STATE OF OKLAHOMA

In re claim of:	
CLINTON SHARP Claimant, LEE WAY MOTOR FREIGHT, INC., and PEPSICO, INC., AS GUARANTOR FOR LEE WAY MOTOR FREIGHT, INC. Respondent. Own Risk/Guarantor Ins. Carrier.	Court No. 84-3754 K Claimant's Soc. Security No. 045-22-4762

MOTION TO SET FOR HEARING
BEFORE COURT EN BANC
AND
MOTION FOR ORDER ON APPEAL TO INCLUDE
PEPSICO, INC. AS GUARANTOR FOR
LEE WAY MOTOR FREIGHT, INC.

Comes now the claimant and moves the Court to set the Notice of Appeal, as filed herein by Lee Way Motor Freight on April 4, 1985, for hearing before a Three-Judge Panel of this Court. In conjunction with said motion, the claimant would show the Court that the case of *Lum vs. Lee Way Motor Freight, Inc., and PepsiCo, Inc.*, ____ P.2d ____, (Supreme Court, Oklahoma, Nov. 10, 1987), held that this Court has the power and the duty to determine which entity must bear the responsibility for payment of its awards, and that PepsiCo, Inc.'s secondary liability, as guarantor of Lee Way Motor Freight, Inc.'s Own Risk Permit from this Court, could be invoked by this Court because Lee Way Motor Freight, Inc. is in bankruptcy and its obligation for payment is unenforceable. Rehearing on said Decision was Denied by Order of the Supreme Court on June 21, 1988.

WHEREFORE, the claimant prays that this cause be set for hearing on appeal, and that the Three-Judge Panel, in its Order on Appeal, affirm the Order of the Trial Judge filed herein on March 28, 1985 and further Order on Appeal that PepsiCo, Inc., as guarantor of Lee Way Motor Freight, Inc., is liable for said Order of the Trial Judge.

GRENNAN & FAULKNER
BY: /s/ JIM GRENNAN
2000 Classen, Suite 120 S.
Oklahoma City, Ok. 73106
(405) 525 8606

Attorney for Claimant

CERTIFICATE OF MAILING

This is to certify that on this *22* day of June, 1988, a true and correct copy of the above and foregoing was mailed, postage prepaid, to:

Ben A. Goff & Mary Ellen Lee, 1212 N.W. 50th, Oklahoma City, Oklahoma 73118, Attorneys for PepsiCo, Inc.; and to

Fred Luper, Trustee for Lee Way Holding Company, 50 West Broad Street, Suite 1200, Columbus, Ohio.

PepsiCo, Inc., Anderson Hill Road, Purchase, New York, 10577, by certified mail, certificate no. P 313786364.

/s/ JIM GRENNAN
Jim Grennan

APPENDIX M

BEFORE THE
WORKERS' COMPENSATION COURT
FOR THE STATE OF OKLAHOMA

CLINTON SHARP,	)	
	)	
Claimant,	)	No. 84-3754K
vs.	)	
	)	Claimant's
LEE WAY MOTOR FREIGHT,	)	Social Security
INC., and PEPSICO, INC.,	)	No. 045-22-4762
	)	
Respondents.	)	

BRIEF IN OPPOSITION TO CLAIMANT'S MOTION FOR ORDER ON APPEAL TO INCLUDE PEPSICO, INC. AS GUARANTOR FOR LEE WAY MOTOR FREIGHT, INC.

The Claimant has moved this Court to order that PepsiCo, Inc. be liable as guarantor on an Order entered against Lee Way Motor Freight, Inc. on March 28, 1985. PepsiCo, Inc. objects to this extraordinary procedure and submits the following memorandum in opposition to this motion.

The Claimant, Clinton Sharp, is a former employee of Lee Way Motor Freight, Inc., a former subsidiary of PepsiCo, Inc.

On March 21, 1984, Claimant filed a claim for compensation in the Workers' Compensation Court of the State

of Oklahoma, against Lee Way alleging that he suffered injuries in the course of his employment with Lee Way on December 21, 1983. On June 22, 1988, the Claimant moved to join PepsiCo as an additional Respondent in this case on the basis of a PepsiCo guaranty of Lee Way's workers' compensation liabilities dated July 27, 1984, and cancelled by PepsiCo on August 29, 1984. (PepsiCo Guaranty attached as Exhibit 1).

PepsiCo asked that the Motion of the Claimant be denied on the following grounds:

(1) Under the decision of the Oklahoma Supreme Court in *Lum vs. Lee Way Motor Freight, Inc.*, No. 64,213, slip op. (Okla. November 10, 1987), PepsiCo's guaranty of Lee Way's workers' compensation liability does not apply to causes, such as the present case, in which no final order or award against Lee Way existed during the life of PepsiCo's guaranty.

(2) The present case is barred by the applicable statute of limitations.

(3) The present case is barred by the doctrine of laches.

(4) Claimant has discharged PepsiCo from its obligations under the guaranty because he has impaired PepsiCo's subrogation rights against Lee Way by his failure to file a proof of claim against the Lee Way bankruptcy estate.

I. PepsiCo's guaranty is not applicable to the present case because under the *Lum* decision, PepsiCo has guaranteed payment only of Workers' Compensation awards entered before PepsiCo canceled its guaranty.

PepsiCo's obligations under its guaranty of Lee Way's workers' compensation liabilities have been addressed by the Oklahoma Supreme Court in *Lum vs. Lee Way Motor Freight, Inc.*, No. 64,213, slip op. (Okla. November 10, 1987). The Oklahoma Supreme court has plainly stated PepsiCo's obligations under the guaranty: "(T)his is a guaranty of a pre-existing and continuing obligation to pay *awards made* during the life of the (Lee Way own risk) permit." *Lum*, slip op. at 15 (emphasis added.)

The Supreme Court emphasizes at numerous places in the *Lum* decision that PepsiCo's obligations under its guaranty extend *only* to orders and awards entered against Lee Way before PepsiCo terminated its guaranty. For example, the Court held that on its interpretation of the guaranty, PepsiCo "unconditionally guarantees payment of *all compensation awards made before the revocation of the guaranty.*" *Lum*, slip op. at 7 (emphasis in original). Again, the Court phrased its holding as being to the effect that PepsiCo was required to "assume the continuing obligation to pay *awards granted* during the life of the permit." *Lum*, slip op. at 13 (emphasis added).

The Court's rationale for limiting PepsiCo's obligations under the guaranty is clear from the *Lum* decision. The Court carefully distinguished PepsiCo's retrospective liability for awards entered before the effective date of the guaranty, from PepsiCo's continuing liability for future claims. Concerning the latter, the Court said, "There is no dispute that the PepsiCo guaranty was continuing and capable of being revoked by the guarantor so that claims arising after its revocation would not be within its terms." *Lum*, slip op. at 6.

In so construing the extent of PepsiCo's obligation, the Court was reflecting the plain language of the PepsiCo

guaranty. the guaranty states, in relevant part, that PepsiCo "guarantees the payment of any and all *awards and judgments* granted by the Oklahoma Workers' Compensation Court . . . or the *amounts ordered* by the said Oklahoma Workers' Compensation Court to any other person, firm or corporation" (emphasis added). And, of course, the guaranty also provides that it will remain in full force and effect only until such time as PepsiCo provides written notice of cancellation to the Workers' Compensation Court, which PepsiCo did on August 29, 1984. *Lum*, slip op. at 2-3.

In sum, the holding of *Lum* is quite clear: under its guaranty of Lee Way's workers' compensation liabilities, PepsiCo has guaranteed payment of all orders and awards entered against Lee Way by the Workers' Compensation Court up to the date of PepsiCo's cancellation of the guaranty. In the present case, an order or award against Lee Way and in favor of the claimant was *not* entered by the Workers' Compensation Court on or before August 29, 1984, the date the guaranty was canceled. PepsiCo's guaranty does not apply to this case, and therefore, this action must be dismissed as to PepsiCo.

II. Claimant's claim against PepsiCo is barred by the applicable Statute of Limitation.

Section 43 of the Workers' Compensation Act, 85 Okla. Stat. Ann. Section 43 (1987), provides that the right to claim compensation under the Act is forever barred unless a claim is filed with the Workers' Compensation Court within two years of the date of injury or within two years of the last payment of any compensation or remuneration authorized by the employer. Because claimant here did not file his claim against PepsiCo within this limitations period, his claim against PepsiCo is forever barred.

It is clear that under Oklahoma law, claimant's action against PepsiCo is time-barred unless claimant filed an action specifically naming PepsiCo as a respondent within the two-year limitations period. In *Wilsey, Bennett Co. v. Grant*, 632 P.2d 382 (Okla. 1981), the Oklahoma Supreme Court held that claims against third-party respondents who might be secondarily liable for an immediate employer's compensation liabilities must be filed within the limitations period fixed by Section 43 of the Act. The Code said:

> "The clear language of Section 43 prescribes but a *single one-year* time limit [since amended to two years] for filing a claim against *any* person liable for compensation. The statute makes *no* distinction between those who bear primary liability and those who may be held secondarily liable.

632 P.2d at 384-385 (emphasis in original.) The Court specifically rejected the reasoning of the Court of Appeals that it was the filing of the claim, not the naming of the individual respondents, that tolled the statute of limitations as to those respondents. 632 P.2d at 386-387 (Simms, J., dissenting).

In the present case, claimant's action against PepsiCo was filed on June 23, 1988, more than two years after December 21, 1983, the date of injury alleged in the Complaint. Under the rule of *Wilsey, Bennett Co.*, claimant's claim against PepsiCo is untimely under Section 43 of the Act and must be dismissed as time-barred.

III. The Court has no jurisdiction over PepsiCo because PepsiCo has not properly been joined as a respondent in this Action.

Although Claimant purports to have named PepsiCo as a respondent in this case, the statutory and due process

requirements for PepsiCo's proper joinder as a respondent in this case have not been met. Specifically, PepsiCo has not received the required notice and service of process in this action. therefore, for the Court to exercise jurisdiction over PepsiCo in this action would be to violate the procedural rules of the Workers' Compensation court and Oklahoma statutes, and would violate PepsiCo's constitutional right to due process of law under the fourteenth amendment to the United States Constitution.

Rule 13 of Rules of the Workers' Compensation Court requires that for every claim filed with the Workers' Compensation court, a notice of claim form "shall be mailed by the court to the employer and the insurance carrier." In *Lum*, the Oklahoma Supreme Court held that because it was a guarantor of Lee Way's workers' compensation obligations, "PepsiCo did, without a doubt, step into the shoes of its subsidiary [Lee Way]." *Lum*, slip op. at 9. thus, PepsiCo was entitled to the same notice as Lee Way, in whose shoes it stands. However, in this case, a notice of claim form, giving notice of the claim against PepsiCo, was not mailed to PepsiCo. Therefore, claimant's action against PepsiCo is not properly within the jurisdiction of this Court.

If PepsiCo is not an "employer" or an "insurance carrier" as those terms are used in Rule 13, then the notice provisions of Rule 13 are not applicable to PepsiCo. In that case, the question of proper notice to PepsiCo would be governed, pursuant to rule 2 of the rules of the Workers' Compensation Court, by "the practices and procedures followed in the district courts of this state." Under those practices and procedures also, this forum lacks jurisdiction over PepsiCo in this case.

Section 2019(A) of the Oklahoma code of Civil Procedure sets out the conditions under which a "person who is sub-

ject to service of process" may be joined as a party in action. 12 Okla. Rev. Stat. Section 2019(A). Clearly, the Code of civil Procedure contemplates that parties may be joined in civil actions only through the procedures of notice and service of process which are applicable to parties generally.

Section 2004(C)(1)(c)(3) of the Code of Civil Procedure provides that service upon a foreign or domestic corporation may be made "by delivering a copy of the summons and of the petition to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . ." 12 Okla. Rev. Stat. Section 2004(C)(1)(c)(3). A corporation may also be served by the Clerk of the Court sending, by certified mail return receipt requested, a copy of the summons and petition to a person authorized to receive process for the corporation. 12 Okla. Rev. Stat. Section 2004(C)(2)(a)-(b). In this case, PepsiCo was never served with process by either method.

The Oklahoma Supreme Court has made clear that the requirements of proper notice and service of process apply with full force and effect to all respondents in proceedings before the Workers' Compensation Court. In *Wilsey, Bennett Co. v. Grant*, 632 P.2d 382 (Okla. 1981), the Oklahoma Supreme Court overruled a previous decision, *Lane Construction & Plumbing Co. v. Green*, 451 P.2d 947 (Okla. 1969), in which the Court had held that an injured construction employee could maintain an action against the construction contractor even though he had initially brought an action only against the subcontractor who directly employed him, and had not properly joined the primary contractor during the statutory limitations period. In overruling *Lane Construction*, the Supreme Court, in *Wilsey, Bennett*, on similar facts, said:

> "That case [*Lane Construction*] appears to rest on the notion that parties-respondent in a compensation proceeding stand identified by operation of law. Implicit in it is an assumption that the choice of adversaries is accomplished automatically as a result of one's employer status *vis-a-vis* the injured worker at the time of injury rather than by a conscious act of the claimant timely identifying on the face of his claim those who are legally responsible to protect him. We must reject the notion that the parties liable for compensation—no matter how deficiently identified on the timely filed claim form—are amendable to some automatically imposable joinder as litigants in a compensation claim."

632 P.2d at 384. Because PepsiCo has not received proper notice and service of process in this case under either the Rules of the Workers' Compensation Court or the Oklahoma Code of Civil Procedure, *Wilsey, Bennett* mandates a holding that the Workers' Compensation Court lacks jurisdiction over PepsiCo in this case.

If the Workers' Compensation Court were to exercise jurisdiction over PepsiCo in this case, this act would not only be contrary to Oklahoma statutory law, but would also be a violation of PepsiCo's due process rights under the fourteenth amendment to the United States Constitution. "Axiomatically, due process requires proper service of process in order to obtain *in personam* jurisdiction" over the defendant in a civil action. *Amen v. City of Dearborn*, 532 F.2d 554, 557 (6th Cir. 1976). *Accord Combs v. Nick Gavin Trucking*, 825 F.2d 437, 442 (D.C. Cir. 1987); *Ackermann v. Levine*, 610 F.Supp. 633, 642 (S.D. N.Y. 1985) ("Proper service of process is essential to a court's jurisdiction because it ensures that the defendant has received notice of the action—a constitutional due process requirement"). The due process test for service

of process is not whether the defendant received actual notice of the action, but whether the method used to effect service was one reasonably calculated to give actual notice. *United States v. Smith*, 398 F.2d 173, 177-178 (3rd Cir. 1968).

In the present case, PepsiCo was not properly served in accordance with either the Rules of the Workers' Compensation Court or the Oklahoma Code of Civil Procedure. In fact, no service of process was received by PepsiCo. As a result, the Court has no jurisdiction over PepsiCo in this case; further exercise of jurisdiction over PepsiCo in this case would violate both Oklahoma statutory law and PepsiCo's constitutional right to due process.

IV. Claimant's action is barred by the doctrine of laches.

Claimant's delay in bringing this action against PepsiCo has resulted in an impairment of PepsiCo's ability to defend this action. The doctrine of laches, therefore, bars claimant from bringing this action.

Laches has two elements: delay on the part of the plaintiff, and prejudice to the defendant. *Olansen v. Texaco, Inc.*, 587 P.2d 976 (Okla. 1978). A party has been prejudiced when delay would prevent the trier of fact from reaching a fair conclusion, as where the evidence of the matters in dispute has been lost or become obscured, so that a court is precluded from ascertaining the truth of the matters in dispute. *Luschen v. Stanton*, 137 P.2d 567 (Okla. 1943); *Baker v. Deichman*, 94 P.2d 246 (Okla. 1939).

In the present case, claimant's delay has caused evidence of the matters in dispute to become lost. In the time since claimant was injured, Lee Way was purchased by and then merged into CL Motor Freight, Inc. ("CL"), which was renamed to Lee Way Holding Co., Inc. All Lee

Way personnel records were moved to Columbus, Ohio, where CL's corporate headquarters was located. Beginning in November, 1984, all Lee Way operations were closed down by CL; in March 1985, lee Way Holding Co., the entity resulting from the merger of Lee Way and CL filed for bankruptcy. In the course of the years since Lee Way Holding Company ceased operations and its entire corporate structure was dismantled, many of the personnel records of Lee Way have been lost. A careful search of Lee Way records at the Columbus warehouse where they are stored has failed to locate claimant's personnel file. (Marovitz Aff., Roth Aff.)

PepsiCo's inability to locate claimant's personnel file has seriously prejudiced PepsiCo's ability to defend this claim. PepsiCo's access to information concerning claimant's past medical history, including pre-existing injuries or disabilities, or history of prior accidents and the compensation received for them, has been blocked. PepsiCo is not even able to verify those most basic facts of claimant's claim, such as the wages he was earning at Lee Way, or even the fact that he was employed by Lee Way at all.

Because PepsiCo has been prejudiced by claimant's unjustified delay in bringing this action against PepsiCo, claimant's action is barred by the doctrine of laches. Claimant's action against PepsiCo, therefore, should be dismissed.

V. PepsiCo is discharged from its obligations under its guaranty because claimant has impaired PepsiCo's right of subrogation under the guaranty against Lee Way.

Claimant seeks to hold PepsiCo liable for a liability of a company which is not a debtor-in-possession in a Chap-

ter 11 bankruptcy proceeding. Lee Way was merged into CL Motor Freight co. ("CL") on February 27, 1985. CL was then renamed Lee Way Holding Co., Inc. and filed for bankruptcy on March 7, 1985.[1] Under Oklahoma law government obligations of guarantors and those whose obligations they guarantee, PepsiCo, as a guarantor of Lee Way's ability, has a right of action against Lee Way for any amounts it pays out under the guaranty. *Smiley v. Wheeler*, 602 P.2d 209 (Okla. 1979). In this case, however, PepsiCo will be unable to collect from Lee Way or Lee Way's estate any money paid to the claimant, because claimant failed to file a proof of claim against Lee Way in bankruptcy court. Because this failure impaired PepsiCo's right to recover from Lee Way for claimant's claim, PepsiCo is discharged, as a matter of law, from its obligations toward claimant under the guaranty.

It has long been established in Oklahoma that if a person for whose benefit a guaranty is made impairs the subrogation rights of the guarantor, the guarantor is discharged. *Smiley v. Wheeler*, 602 P.2d 209 (Okla. 1979); *Beneficial Finance Co. of Norman v. Marshall*, 551 P.2d 315 (Okla. app. 1976). Cases from other jurisdictions also demonstrate that it is a universal principle of guaranty law that when a creditor acts, or fails to act, in a way that prejudices the guarantor's right of subrogation, the obligation of the guarantor is discharged. *Indusco Mgt. Corp. v. Robertson*, 40 Cal. App. 3d 456, 114 Cal. Rptr. 47 (1974) (guarantor discharged where creditor destroyed guarantor's subrogation rights through sale of property

---

[1] Although Lee Way Holding Co., Inc. is a corporate successor to Lee Way Motor Freight, Inc., which had been a subsidiary of CL before the merger. Both companies are referred to collectively as "Lee Way" for the purpose of this Motion to Dismiss.

under trust deed); *Union Bank v. Gradsky*, 256 Cal. App. 2d 40, 71 Cal. Rptr. 64 (1968) (guarantor discharged where creditor destroyed guarantor's subrogation rights by electing remedy of nonjudicial sale of security); *Langevald v. L.R.Z.H. Corp.*, 74 N.J. 45, 376 A.2d 931 (1977) (guarantor discharged where creditor failed to record mortgage securing principal's debts, allowing additional liens to intervene).

In this case, claimant has irreparably prejudiced PepsiCo's subrogation rights against Lee Way for its liability for claimant's award under the Workers' Compensation Act. Claimant failed to file a timely proof of claim with the United States Bankruptcy court asserting his workers' compensation claim against Lee Way. (Aff.) The final date by which proofs of claim could be filed against Lee Way in its bankruptcy proceeding was December 15, 1985. (*See* September 9, 1985 order of U.S. Bankruptcy Court for the Southern District of Ohio attached as Exhibit 2). Claimant has thus irrevocably lost any claim he might have had against Lee Way for injuries he has suffered in connection with his employment with Lee Way. Since PepsiCo, as a guarantor of Lee Way's workers' compensation liabilities, is subrogated to claimant's rights against Lee Way, PepsiCo has also irrevocably lost his claim against Lee Way.

IV. The Court is without authority to modify the award of the trial court in this action by adding an additional party.

Review by the Court en banc is limited to a search for competent evidence to support that Order. Unless evidence is found, the Court en banc cannot act. *See Parks v. Norman Municipal Hospital*, Okl. 684 P.2d 548 (1984). The

issue of whether or not PepsiCo, Inc. should be added as guarantor was not property before the Trial Court and, therefore, this issue was not dealt with in the Trial Court's Order. 85 O.S. Section 3.6 provides:

> "The Court en banc may reverse or modify the decision only if it determines that such decision is against the clear weight of the evidence or contrary to law."

This Court is without authority to grant the claimant the relief he seeks.

In sum, claimant's inaction has impaired PepsiCo's subrogation rights against the Lee Way estate, and for that reason, under well-established Oklahoma guaranty law, PepsiCo is released from its obligations under its guaranty of Lee Way's Oklahoma workers' compensation liability.

Respectfully submitted,

BEN A. GOFF, OBA #3424
1212 N.W. 50th Street
Oklahoma City, Oklahoma 73118
(405) 843-8401

ATTORNEY FOR PEPSICO, INC.

CERTIFICATE OF MAILING

I hereby certify that on the ____ day of July, 1988, a true and correct copy of the above and foregoing Brief in Opposition to Claimant's Motion for Order on Appeal to Include PepsiCo, Inc., as Guarantor for Lee Way Motor Freight, Inc. was mailed postage prepaid to: Mr. Jim Grennam, GRENNAM & FAULKNER, 2000 Classen Center, Suite 120 S, Oklahoma City, Oklahoma 73106, Attorney for the Claimant.

BEN A. GOFF

APPENDIX N

[FILED AUGUST 22, 1988]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

PEPSICO, INC.	)	
	)	
Petitioner,	)	
	)	
vs.	)	Court No.
	)	71575
	)	
CLINTON SHARP, and the	)	WCC No.
WORKERS' COMPENSATION COURT,	)	84-3754K
	)	
Respondent.	)	

PETITION FOR REVIEW
(PRELIMINARY STATEMENT)

A. WORKERS' COMPENSATION COURT HISTORY

NUMBER AND STYLE OF PROCEEDING IN THE COURT:

84-3754K Clinton Sharp vs. Lee Way Motor Freight, Inc. and PepsiCo, Inc., Own Risk.

DECISION TO BE REVIEWED WAS RENDERED BY: (CHECK ONE)

(X) The Workers' Compensation Court En Banc, or

( ) A Judge of the Court

DATE OF RENDITION OF THE DECISION TO BE REVIEWED?

July 29, 1988

DATE A COPY OF THE DECISION WAS SENT TO THE PARTIES?

August 2, 1988

IF SEEKING A REVIEW OF THE DECISION OF THE COURT EN BANC, ALSO GIVE DATE OF THE DECISION BY THE TRIAL JUDGE *March 28, 1985* AND THE DATE AN APPEAL WAS BROUGHT BY THE TRIBUNAL EN BANC: *April 4, 1985*

B. DISPOSITION IN THE WORKERS' COMPENSATION COURT

NATURE OF THE DECISION TO BE REVIEWED: *This is an appeal from an Order of the Court En Banc which affirmed the Order of the Trial Court and joined PepsiCo, Inc. as a party respondent and held PepsiCo, Inc. responsible for the payment of this claim.*

RELIEF SOUGHT: *The claimant sought an award against Lee Way Motor Freight, Inc. and PepsiCo, Inc. as guarantor at the hearing before the Trial Judge for temporary total disability and medical treatment. The claimant did not appeal from the Order of the Trial Court against Lee Way Motor Freight, Inc. After the appeal time had passed, the claimant filed a motion with the Workers' Compensation Court to join PepsiCo, Inc. as a party. Lee Way Motor Freight, Inc. had sought reversal of the Order of the Trial Court as to Lee Way Motor Freight, Inc.*

RELIEF GRANTED: *The original Trial Judge granted the claimant an award for medical treatment and a continuing Order for temporary total disability benefits against Lee Way Motor Freight only. The Court En Banc affirmed this award and sustained the motion of the claimant made during the appeal to join PepsiCo, Inc. as a party and held PepsiCo, Inc. responsible for the payment of this claim. (A copy of the Order of the Trial Judge is attached as Exhibit "A1". A copy of the Order of the Workers' Compensation Court En Banc is attached as Exhibit "A2").*

A COPY OF THE CLERK'S CERTIFICATE THAT THE EMPLOYER HAS AN APPROVED STATUTORY BOND ON FILE WITH THE COURT ALSO IS ATTACHED HERETO *X* YES ___NO

C. BRIEF SUMMARY OF PROCEEDINGS

See attached Exhibit "B".

D. ISSUES AND ERRORS PROPOSED TO BE RAISED ON APPEAL

See attached Exhibit "C".

ANY RELATED OR PRIOR APPEALS? Yes *X* No ___ (Identify by style, citation, if any, and the Supreme Court No.)

See attached Exhibit "D".

ESTIMATE BY COURT REPORTER OF NUMBER OF TRANSCRIBED PAGES:

E. IS PETITIONER WILLING TO PARTICIPATE IN AN ATTEMPTED SETTLEMENT OF THE APPEAL BY PRE-DECISIONAL CONFERENCE UNDER THE COURT OF APPEALS RULE 3.7 IF OFFERED THE OPPORTUNITY? Yes ___ No *X*

F. IS PETITIONER AGREEABLE TO ACCELERATE PROCEDURES FOR THIS APPEAL UNDER COURT RULE? (Fast Track) Yes___ No *X*

(1) If not agreeable, why not? *The case at bar presents a matter of dispositive importance to this case and related cases and appeals. It involves novel questions as to the application and construction of guaranty not previously ruled on by this Court. It is not properly subject to fast track procedures. Fast track procedures have not been agreed to in the other related appeals.*

G. ANY OTHER COMMENT AS TO COURT OR MODE OF DECISION: *No*

NAME OF COUNSEL OR PARTY
ATTORNEY FOR PETITIONER:

NAME *BEN A. GOFF, OBA #3424*
FIRM *BEN A. GOFF, P.C.*
ADDRESS *1212 N.W. 50th Street*
Oklahoma City, Oklahoma
TELEPHONE *(405) 843-8401*

ATTORNEY FOR RESPONDENT:
(Other than Court)

NAME *JIM GRENNAN, OBA #3598*
FIRM _____
ADDRESS *2000 Classen, 120 S.*
Oklahoma City, Okla.
TELEPHONE *(405) 525-8606*

DATE *August ___, 1988.* Verified By:

_____

BEN A. GOFF, OBA #3434
Ben A. Goff, P.C.
1212 N.W. 50th Street
Oklahoma City, Oklahoma 73118
(405) 843-8401

and

JOSEPH R. LUNDY
PAUL J. GUDEL
Schiff, Hardin & Waite
7200 Sears Tower
Chicago, Illinois 60606
(312) 896-1000

CHARLES GREEN
Main & Broadway, 10th Floor
Oklahoma City, Oklahoma
(405) 239-6444

ATTORNEYS FOR PETITIONER

CERTIFICATE OF FILING

I Ben A. Goff do hereby certify that on the *22* day of August, 1988, I did cause to be filed with the Workers' Compensation Court, a correct copy of the above Petition for Review with attachments, and also mailed a copy with attachments, postage prepaid, to each party to the proceeding or his counsel or record as follows:

Mr. Jim Grennan
2000 Classen, 120 South
Oklahoma City, OK 73106

/s/ Ben A. Goff
BEN A. GOFF

EXHIBIT "B"

BRIEF SUMMARY OF PROCEEDINGS

This is an appeal by PepsiCo, Inc. ("PepsiCo") from an Order of the Workers' Compensation Court *En Banc*, holding that PepsiCo was responsible for the payment of claimant's award under a guaranty by PepsiCo of Lee Way Motor Freight Co.'s ("Lee Way's") workers' compensation liabilities, which PepsiCo had revoked before claimant's award was rendered.

Claimant Clinton Sharp filed his initial workers' compensation claim against Lee Way on March 1, 1984, alleging that on December 21, 1983 he had suffered an injury to his lower back. On April 3, 1984, Lee Way filed an answer admitting the claim but denying that the claimant had suffered permanent partial disability.

On January 9, 1985, this claim was set for hearing on the issue of continuing temporary total disability benefits and reimbursement of costs of claimant's medical treatment. The case was heard on February 25, 1985. At this hearing, claimant moved for an order holding PepsiCo liable for his award; however, the Trial Judge refused this motion and entered a 300-week temporary total disability order against Lee Way only. This order was appealed by Lee Way to the Workers' Compensation Court *En Banc*.

Proceedings on Lee Way's Request for Review by the Court *En Banc* were held in abeyance pending the outcome of PepsiCo's appeal to the oklahoma Supreme Court of *Lum v. Lee Way Motor Freight Company*, No. 64,213. *Lum* raised the issue of PepsiCo's liability under its guaranty for Lee Way's workers' compensation claims which arose, as did claimant's, before PepsiCo executed its guaranty.

On or about June 22, 1988, claimant filed a document captioned "Motion to Set for Hearing Before A Court *En Banc* and Motion for Order on Appeal to Include PepsiCo, Inc. as Guarantor for Lee Way Motor Freight, Inc." After the Oklahoma Supreme Court's final decision in *Lum*, Lee Way's appeal of this case was heard by the Workers' Compensation Court *En Banc* on July 29, 1988.

On August 2, 1988, the Workers' Compensation Court *En Banc* entered an order joining PepsiCo as a party respondent. The Court *En Banc* also held that the ruling in *Lum* required PepsiCo to be held liable for all Lee Way workers' compensation claims that arose during the term of Lee Way's Own Risk permit, even if the award was not entered until after PepsiCo had terminated its guaranty. The Court *En Banc* ordered PepsiCo to pay the claimant's award plus interest from the date of the entry of the original award.

EXHIBIT "C"

ISSUES AND ERRORS TO BE RAISED ON APPEAL

1. That the Workers' Compensation Court *En Banc* does not have jurisdiction to entertain a motion to join an add'l party.

2. That the Workers' Compensation Court erred in exercising jurisdiction over PepsiCo in this case because PepsiCo has not been properly served as a party respondent.

3. That claimant's claim against PepsiCo is barred by the appropriate statute of limitations, because claimant did not file a claim against PepsiCo within the 2-year statute of limitations of the Workers' Compensation Act, 85 Oklahoma Statutes Sec. 43.

4. That claimant waived his right to proceed against PepsiCo before the Workers' Compensation Court *En Banc* by his failure to appeal the Trial Judge's order refusing to join PepsiCo as a respondent in this case.

5. That an award cannot be enforced against a guarantor in the absence of evidence of a default by the party whose obligation was guaranteed.

6. That the Workers' Compensation Court erred in holding that PepsiCo's guaranty of Lee Way's workers' compensation liabilities extended to cases in which orders and awards were entered after the date of PepsiCo's revocation of its guaranty.

7. That the Workers' Compensation erred in finding that *Lum* requires PepsiCo to be held liable for orders and awards entered after the date PepsiCo revoked its guaranty.

8. That the claimant's failure to file a proof of claim against the bankruptcy estate of Lee Way Holding Company has prejudiced PepsiCo's subrogation rights and has therefore discharged PepsiCo's liability to claimant under the guaranty.

9. That PepsiCo has been denied due process of law.

10. That the Workers' Compensation Court erred in ordering that interest on claimant's award should accrue against PepsiCo from the date the original order was entered against Lee Way, rather than from the date PepsiCo was held liable for claimant's award.

EXHIBIT "D"

ANY RELATED OR PRIOR APPEALS

Lum vs. Lee Way Motor Freight, Inc., No. 64,213, slip op. (Sup. Ct. of Okl. November 10, 1987);

Martinez vs. Lee Way Motor Freight, WCC No. 84-1777X;

Dalton vs. Lee Way Motor Freight, Inc., WCC No. 84-9535F;

Stockton vs. Lee Way Motor Freight, Inc., WCC No. 84-3432A;

Crocker vs. Lee Way Motor Freight, Inc., WCC No. 84-9706R;

APPENDIX O

U.S. Const. amend. XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX P

Okla. Stat. tit. 12, § 2004 (1989)

PROCESS

A. SUMMONS: ISSUANCE. Upon filing of the petition, the clerk shall forthwith issue a summons. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

B. SUMMONS: FORM. The summons shall be signed by the clerk, be under seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise, the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the petition.

A judgment by default shall not be different in kind from or exceed in amount that prayed for in either the demand for judgment or in cases not sounding in contract in a notice which has been given the party against whom default judgment is sought. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

C. BY WHOM SERVED: PERSON TO BE SERVED.

1. SERVICE BY PERSONAL DELIVERY. a. At the election of the plaintiff, process, other than a subpoena, shall be served by a sheriff or deputy sheriff, a person licensed to make service of process in civil cases, or a person specially appointed for that purpose. The court shall freely make special appointments to serve all process, other than a subpoena, under this paragraph.

b. A summons to be served by the sheriff or deputy sheriff shall be delivered to the sheriff by the county clerk or an attorney of record for the plaintiff. When a summons, subpoena or other process is to be served by the sheriff or deputy sheriff of another county, the court clerk shall mail it, together with his voucher for the fees collected for said service, to the sheriff of that county. The sheriff shall deposit the voucher in the Sheriff's Service Fee Account created pursuant to Section 514.1 of Title 19 of the Oklahoma Statutes. The sheriff or deputy sheriff shall serve the process in the manner that other process issued out of the court of his own county is served. A summons to be served by a person licensed to make service of process in civil cases or by a person specially appointed for that purpose shall be delivered by an attorney of record for the plaintiff to such person.

c. Service shall be made as follows:

(1) Upon an individual other than an infant who is less than fifteen (15) years of age or an incompetent person, by delivering a copy of the summons and of the petition to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person then residing therein who is fifteen (15) years of age or older or by delivering a copy of the summons and of the petition to an agent authorized by appointment or by law to receive service of process;

(2) Upon an infant who is less than fifteen (15) years of age, by serving the summons and petition upon him personally and upon either of his parents or his guardian, or if they cannot be found, then upon the person having the care or control of the infant or with whom he lives; and upon an incompetent person by serving the

summons and petition upon him personally and upon his guardian;

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the petition to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant;

(4) Upon the United States or an officer or agency thereof in the manner specified by Federal Rule of Civil Procedure 4; and

(5) Upon a state, county, school district, public trust or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the petition to the officer or individual designated by specific statute; however, if there is no statute, then upon the chief executive officer or a clerk, secretary, or other official whose duty it is to maintain the official records of the organization.

2. SERVICE BY MAIL. a. At the election of the plaintiff, a summons and petition may be served by mail by the plaintiff's attorney, any person authorized to serve process pursuant to subparagraph a of paragraph 1 of this subsection, or by the court clerk upon a defendant of any class referred to in division (1), (3), or (5) of subparagraph c of paragraph 1 of this subsection. Service by mail shall be effective on the date of receipt or if refused, on the date of refusal of the summons and petition by the defendant.

b. Service by mail shall be accomplished by mailing a copy of the summons and petition by certified mail, return receipt requested and delivery restricted to the addressee. When there is more than one defendant, the summons and a copy of the petition or order shall be mailed in a separate envelope to each defendant. If the summons is to be served by mail by the court clerk, the court clerk shall enclose the summons and a copy of the petition or order of the court to be served in the envelope, prepared by the plaintiff, addressed to the defendant, or to the resident service agent if one has been appointed. The court clerk shall prepay the postage and mail the envelope to the defendant, or service agent, by certified mail, return receipt requested and delivery restricted to the addressee. Such return receipt shall be prepared by the plaintiff.

c. Service by mail shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant. Acceptance or refusal of service by mail by a person who is fifteen (15) years of age or older who resides at the defendant's dwelling house or usual place of abode shall constitute acceptance or refusal by the party addressed. In the case of an entity described in division (3) of subparagraph c of paragraph 1 of this subsection, acceptance or refusal by any officer or by any employee of the registered office or principal place of business who is authorized to or who regularly receives certified mail shall constitute acceptance or refusal by the party addressed. A return receipt signed at such registered office or principal place of business shall be presumed to have been signed by an employee authorized to receive certified

mail. In the case of a state municipal corporation, or other governmental organization thereof subject to suit, acceptance or refusal by an employee of the office of the officials specified in division (5) of subparagarph c of paragraph 1 of this subsection who is authorized to or who regularly receives certified mail shall constitute acceptance or refusal by the party addressed. If delivery of the process is refused, upon the receipt of notice of such refusal and at least ten (10) days before applying for entry of default, the person elected by plaintiff pursuant to subparagraph a of this paragraph to serve the process shall mail to the defendant by first-class mail a copy of the summons and petition and a notice prepared by the plaintiff that despite such refusal the case will proceed and that judgment by default will be rendered against him unless he appears to defend the suit. Any such default or judgment by default shall be set aside upon motion of the defendant if the defendant demonstrates to the court that the return receipt was signed or delivery was refused by an unauthorized person. Such motion shall be filed within one (1) year after the defendant has notice of the default or judgment by default but in no event more than two (2) years after the judgment.

APPENDIX Q

Okla. Stat. tit. 12, § 2015 (1984)

AMENDED AND SUPPLEMENTAL PLEADINGS

A. AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty (20) days after it is served. Amendments to add omitted counterclaims or to add or drop parties may be made as a matter of course within the time specified above. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall respond to an amended pleading within the time remaining for response to the original pleading or within ten (10) days after the service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

APPENDIX R

Okla. Stat. tit. 12, § 2019 (1984)

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

A. PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process shall be joined as a party in the action if:

1. In his absence complete relief cannot be accorded among those already parties; or

2. He claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:

   a. as a practical matter, impair or impede his ability to protect that interest, or

   b. leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff.

APPENDIX S

85 Ch. 4, App.
Rule 11

Okla Stat. tit. 85, ch. 4, App. Rule 11 (1981)

Forms—Preparation and Use

The Court shall prepare and adopt such forms for use in matters before the Court as it may deem necessary or advisable. Whenever Court forms are prescribed and are applicable, they shall be used. Printed copies of all forms may be procured in reasonable quantities upon request to the Clerk of the Court.

The following forms have been adopted by the Court:

Form 1-a: Notice and Instructions to Employers and Employees.

Form 1-b: Employer's Application for Permission to Carry Its Own Risk Without Insurance.

Form 2: Employer's First Notice of Injury.

Form 3: Employee's First Notice of Accidental Injury and Claim for Compensation.

Form 3-a: Claimant's First Notice of Death and Claim for Compensation.

Form 3-b: Employee's First Notice of Occupational Disease and Claim for Compensation.

Form 3-f: Employee's Claim for Benefits from the Special Indemnity Fund.

Form 4: Attending Physician's Report and Notice of Treatment.

Form 5: Employer's Supplemental Notice of Injury.

Form 6: Employer's or Insurance Carrier's Initial Report of Payment of Compensation.

Form 7: Notice of Medical Examination.

Form 8: Acknowledgement by Employee of Receipt of Compensation Payment.

Form 9: Motion of Claimant to Set for Trial.

Form 10: Pretrial Stipulation Offered by Respondent.

Form 11: Motion of Respondent to Set for Trial—Motion to Terminate Temporary Compensation.

Form 12: Pretrial Stipulation Offered by Claimant—Objection to Termination of Temporary Compensation.

Form 13: Request for Prehearing Conference.

Form 14: Agreement between Employer and Employee as to Fact with Relation to any Injury and Payment of Compensation.

Form 18: Request for Administrative Review of Medical Charges.

Form 19: Request for Payment of Charges for Medical or Rehabilitation Services.

Form 20: Proof of Loss in Death Claims. Joint Petition.

APPENDIX T

Okla. Stat. tit. 85, ch. 4, App. Rule 13 (1987)

Commencement of Claim

A proceeding for compensation under the Workers' Compensation Act shall be commenced by filing, in triplicate, the appropriate notice form. The following forms shall be used:

Form 3 for accidental injury benefits;

Form 3-a for death benefits; and

Form 3-b for occupational disease benefits.

A proceeding for the recovery of health service expenses (physician fees, hospital costs, etc.) shall be commenced by filing, in duplicate, a Form 19.

When the claimant files a notice of claim form initiating a proceeding (Form 3, Form 3-a or Form 3-b), a copy of that notice of claim form bearing the assigned case number and the filing date shall be mailed by the Court to the employer or the insurance carrier.

APPENDIX U

Subsidiaries and Affiliates of PepsiCo, Inc. *

Alpac Corporation
Arnott's Snack Foods
Bebidas Purificadas del Norte, S.A.
Beijing Pepsi-Cola Beverage Company Ltd.
Blanchard, S.A.
Britvic Corona Ltd.
Cal-Pepsi, Inc.
Central Valley Beverage Company, Inc.
Channel Island Beverage Co., Inc.
Chicago and Rush
Corina Snacks
Equipos y Deportes Exclusivos, S.A. de C.V.
F&C Beverages
Fujiya Frito-Lay, Ltd.
Guangzhou Flavours Development Corporation
Guangzhou Hua Chang Toy Co. Ltd.
International Process Foods
Kentucky Fried Chicken Beijing Limited
Kentucky Fried Chicken Espana, S.A.
Kentucky Fried Chicken (Great Britain) Limited
Kentucky Fried Chicken Japan Ltd.
Kentucky Fried Chicken Management Pte. Ltd.
Kentucky S.A. S.A.
K.F.C. (N.Z.) Ltd.
Lindsey Bottling Company, Inc.
Lindsey Holding Company, Inc.
Mid-South Acquisition Corporation
Orion Frito-Lay Corporation
PAI S.p.A.
PepsiCo (U.K.) Pension Trust Limited

* This list excludes those subsidiaries that are directly or indirectly wholly-owned by PepsiCo, Inc.

Pepsi-Cola Allied Bottlers, Inc.
Pepsi-Cola Bottling Co. of Bend
Pepsi-Cola Bottling of Northern California
Pepsi-Cola Bottling of Roseburg
Pepsi-Cola General Bottlers, Inc.
Pizza Hut del Distrito, S.A. de C.V.
Pizza Hut G.m.b.H.
Pizza Hut G.m.b.H. & Co. K.G.
Pizza Hut Restauration G.m.b.H.
Pizza Hut S.N.C.
Pizza Hut (UK) Ltd.
Presco Corporation
President Enterprises
Serm Suk Co. Ltd.
Seven-Up Andino S.A.
Shanghai McCormick Seasoning & Foodstuffs Company
Siam Snack Company, Ltd.
Sportmex Internacional S.A. de C.V.
Taiwan Pepsi-Cola Bottling Company, Inc.
The Hostess-Frito-Lay Company
Willamette Beverage Co.

Supreme Court, U.S.
FILED
FEB 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1022

In The

Supreme Court of the United States

October Term, 1989

PEPSICO, INC.,

Petitioner,

vs.

CLINTON SHARP,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

JIM GRENNAN
2000 Classen, Suite 120 S.
Oklahoma City, OK 73106
(405) 525-8606

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The question presented is:

1. Was the Petitioner, PepsiCo, Inc., afforded its rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as a guarantor of the workers' compensation obligations of Lee Way Motor Freight, Inc. to Clinton Sharp?

PARTIES TO THE PROCEEDING

This action was commenced in the Workers' Compensation Court of the State of Oklahoma by Clinton Sharp ("Sharp") against Lee Way Motor Freight, Inc. (Lee Way) on March 8, 1984. Sharp's workers' compensation benefits had been voluntarily paid by Lee Way prior to Sharp's commencement of this action. Lee Way's voluntary payments continued until December 8, 1984. Petition, App. 16. However, prior to ceasing voluntary payments, PepsiCo, Inc., (PepsiCo) on July 27, 1984 guaranteed Lee Way's workers' compensation liability. Petition, App. 4. Upon ceasing voluntary payments, Sharp requested a trial date to determine his right to further weekly compensation benefits, (TTD), and to medical treatment, since ceasing voluntary payments was contrary to the Rules of the Workers' Compensation Court. App. 1. By reason of the guaranty of PepsiCo, notice of trial had on February 25, 1985 was given to Lee Way and to PepsiCo, each of whom appeared at trial represented by the same attorney. Petition, App. 5. App. 4-8.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINION AND ORDERS BELOW 1

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES 2

STATEMENT OF THE CASE 2

Proceedings in the Workers' Compensation Trial Court 2

Proceedings Before the Supreme Court of Oklahoma 2

REASONS FOR DENYING THE WRIT 4

CONCLUSION 8

INDEX TO APPENDICES ..... App. i

TABLE OF AUTHORITIES

Page

CASES

Carroll v. District Court of Fifteenth Judicial Dist. Court, Cherokee County, Okl., 579 P.2d 828 (Okla. 1978) 8

PepsiCo, Inc. v. Sharp, 781 P.2d 814 (Okl. 1989) 2

Wilsey, Bennett Co. v. Grant, 632 P.2d 382 (Okl. 1981) 6, 7

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, Sec. 1 ..... i, 5, 8

STATUTES

Okla. Stat. tit. 15, Sec. 332 (1981) 7, 8

Okla. Stat. tit. 85, Sec. 22(5) 3

No. 89-1022

In The

Supreme Court of the United States

October Term, 1989

PEPSICO, INC.,

Petitioner,

vs.

CLINTON SHARP,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

Respondent respectfully prays that an order be issued denying the Petition for a Writ of Certiorari as prayed for by the Petitioner.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Oklahoma affirming PepsiCo's liability for payment of Sharp's workers' compensation award and finding that PepsiCo

was not denied due process of law is correctly reproduced at App. 1, et seq, of the Petition for Writ of Certiorari. However, this opinion is reported at 781 P.2d 814 (Okl. 1989).

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

In addition to the Appendix of the Petition herein, Respondent appends additional pertinent text of the Oklahoma Workers' Compensation Act.

STATEMENT OF THE CASE

Respondent adopts, with the exception of the following omissions or inaccuracies, the Statement of the Case as set forth in the Petition for Writ of Certiorari.

Proceedings in the Workers' Compensation Trial Court

As stated at page 5 of the Petition herein, Sharp's first trial of his claim for workers' compensation benefits was heard on February 25, 1985 before the Oklahoma Workers' Compensation Court. At that hearing, Lee Way and PepsiCo appeared by and through the same counsel. Petition, App. 5. App. 4-8. PepsiCo has been represented by counsel at every proceeding had on and after February 25, 1985.

Proceedings Before the Supreme Court of Oklahoma

At Page 9 of the Petition, the Petitioner aptly points out an inaccuracy in the Opinion of the Oklahoma

Supreme Court wherein it refers to the trial held on February 25, 1985 as being a "certification hearing", such inaccuracy appearing at Appendix 5, 8, 10, and 11 of the Petition. At Page 10 of its Petition, it goes on to correctly state that the February 25, 1985 hearing was in fact the hearing at which Sharp's award was entered. However, Petitioner inaccurately states thereafter that: "Because no award had been previously entered and because, therefore, Lee Way could not have been in default, ***". Lee Way was, in fact, in default of its statutory obligation to continue its voluntary payment of weekly compensation to Sharp.[1] Notice of the February 25, 1985 hearing, was provided to PepsiCo. Although this hearing was incorrectly classified by the Oklahoma Supreme Court, "The Oklahoma Supreme Court then held that, because PepsiCo was given 'notice of the hearing and an opportunity to be heard, due process requirements were satisfied and the jurisdiction of the Workers' Compensation Court was properly invoked.' " Petition, Page 10.

---

[1] Voluntary payment of weekly compensation was commenced by Lee Way on January 1, 1984 and paid until December 8, 1984. Such payment is set forth in the first Order ever issued on Sharp's claim, the same being the Order filed on March 28, 1985 as a result of the hearing held on February 25, 1985. Petition, App. 16. Voluntary payment having been so commenced, it could only be terminated in the event that Sharp had not filed his Form 3 claim, had returned to work full time with Lee Way, or upon voluntary written agreement of the parties that such payments may terminate. App. 1 & 2. Such events did not occur. Therefore, when the Order was filed on March 28, 1985, it provided for a 10 percent interest penalty on the amount past due since December 8, 1984. Such interest penalty is required by Oklahoma Statutes, Title 85, Section 22(5). App. 1-3.

This inaccuracy of classification of the February 25, 1985 hearing may yet be corrected upon motion or sua sponte by the Supreme Court of the State of Oklahoma. Whether or not so corrected, the Petitioner, PepsiCo appeared by and through counsel at the February 25, 1985 hearing. App. 5.

REASONS FOR DENYING THE WRIT

As reasons for granting the Writ of Certiorari, PepsiCo has espoused, as set forth above, the proposition that Lee Way was not in default at the time Lee Way and PepsiCo appeared by and through counsel at the hearing on February 25, 1985. However, at that hearing Sharp requested and obtained an Order for payment of his past due weekly compensation with penalty of 10 percent for each week not paid on and after December 8, 1984. Petition, App. 16. Lee Way had defaulted on its statutory obligations, when it ceased its voluntary payments to Sharp on December 8, 1984. App. 1-3 and 9. Lee Way was therefore assessed the 10 percent penalty in the Order filed on March 28, 1985. Petition, App. 16.

Although the Supreme Court of the State of Oklahoma erroneously categorized the hearing of February 25, 1985 as a "certification hearing", PepsiCo had, **before that hearing**, given the Workers' Compensation Court of Oklahoma its guaranty to pay the workers' compensation obligations of Lee Way. As found by the Order of the February 25, 1985 hearing, Lee Way was in default of its statutory obligation to continue its voluntary weekly

compensation payments to Sharp and was penalized for not so doing.

PepsiCo appeared by and through counsel at that Hearing on February 25, 1985. App. 5. It has so appeared ever after, yet it continues to espouse its denial of its Constitutional right to Due Process under the Fourteenth Amendment to the United States Constitution. It does so upon several propositions.

Lee Way was in default of its workers' compensation payments due Sharp. PepsiCo had given its guaranty of those payments. As stated above, the default of Lee Way and the guaranty of Lee Way's obligations by PepsiCo, occurred prior to the February 25, 1985 hearing. In its reason for granting the Writ of Certiorari, PepsiCo argues that its presence at the February 25, 1985 hearing should not be considered by this Court. The Supreme Court of Oklahoma based its holding that PepsiCo was afforded due process upon its finding that PepsiCo received "notice of the hearing and an opportunity to be heard", as indeed it had. Petition, App. 10, and footnote 6. App. 4-8. However, PepsiCo contends that the Supreme Court of Oklahoma "explicitly rejected as the 'basis for determination of this issue' the presence of PepsiCo's counsel at the February 25, 1985 hearing and his statement that PepsiCo had been served". There was no such "explicit rejection" by the Supreme Court of Oklahoma. The decision of the Supreme Court of Oklahoma, at Appendix 10 of the Petition, clearly states that due process and jurisdiction of the trial court were satisfied by certified notice of the February 25, 1985 hearing being provided to PepsiCo. Thereafter, in footnote 7, the Supreme Court of Oklahoma went on to state that: "Although not the basis

for determination of this issue, it should be noted that PepsiCo appeared at the hearing after filing its 'answer' in which it called itself 'respondent' At the hearing, PepsiCo's counsel stated he represented both Lee Way and PepsiCo and that PepsiCo had been served."

PepsiCo next poses the proposition that since it was not "named or designated as a party-respondent, or made a party by service of process", the Supreme Court of Oklahoma has impermissibly empowered the Oklahoma Workers' Compensation Court to enter judgment against PepsiCo without properly securing personal jurisdiction of PepsiCo.

PepsiCo argues that by reason of *Wilsey, Bennett Co. v. Grant*, 632 P.2d 382, 386 (Okla. 1981), and Rule 13 of the Workers' Compensation Court Rules, it must be named as a party and served with process in this workers' compensation action between the employer, Lee Way and Sharp. In so doing, it continues to assert itself as being the respondent/employer of Sharp. It acknowledges, however, that "the Oklahoma Supreme Court found that PepsiCo was neither Sharp's employer nor an insurance carrier,***." Petition, Page 18. The Oklahoma Supreme Court also determined that *Wilsey, Bennett Co.* was not applicable to the facts herein as PepsiCo was a guarantor who guaranteed the workers' compensation liabilities of its wholly own subsidiary so that Lee Way could remain an own risk employer. Petition, App. 8 and 9.

PepsiCo further argues that the Supreme Court of Oklahoma improperly distinguished *Wilsey, Bennett Co.* as being inapplicable to the facts of this case because of that Court's "***misapprehension that PepsiCo and Lee Way

had a parent-subsidiary or alter-ego relationship" whereas that relationship had ceased on August 6, 1984, a date prior to PepsiCo's receipt of notice and its appearance at the February 25, 1985 court hearing. Petition, Page 19.

Although this relationship of Lee Way and PepsiCo had ceased prior to the February 25, 1985 hearing, when the decision of the Oklahoma Supreme Court is read in its entirety, its wording "of its wholly owned subsidiary", appearing at Appendix 9 of the Petition, is surplusage. This is so because PepsiCo had, on July 27, 1984, provided to the Oklahoma Workers' Compensation Court its guarantee that it would be responsible for any liabilities that Lee Way might incur under the Oklahoma Workers' Compensation Act. Petition, Page 3. In deciding Sharp, the Oklahoma Supreme Court held that PepsiCo "***became immediately liable under the guaranty only when Lee Way failed to pay Sharp's workers' compensation award.[6]" Its footnote 6 states that: "Guaranty law provides that '[a] guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice. Okla. Stat. tit. 15, Section 332 (1981)." Petition, App. 10. Therefore, contrary to PepsiCo's assertion that *Wilsey, Bennett Co.* was distinguished and rejected contrary to law or fact because no "parent-subsidiary or alter-ego relationship" existed at the time it was given notice and appeared at the February 25, 1985 hearing, the date applicable to its status as a guarantor was December 9, 1984, the date when its principal, Lee Way, defaulted on its statutory

obligation to continue payments to Sharp, whereby PepsiCo, as guarantor, became liable upon its guarantee without demand or notice.

CONCLUSION

As guarantor of the obligations of Lee Way, which obligations are statutorily imposed by the workers' compensation law of Oklahoma, PepsiCo entered its appearance at the commencement of Sharp's hearing wherein he sought an Order of the Workers' Compensation Court of the State of Oklahoma. Sharp obtained such Order. Such Order was obtained solely against Lee Way. Petition, App. 15. By reason of Oklahoma Statute, Title 15, Section 332, Sharp would have enforced that Order by bringing suit in a Court of unlimited jurisdiction against PepsiCo by reason of PepsiCo's guaranty of payment of such Order. He would have, except for the fact that although the Workers' Compensation Court of the State of Oklahoma is a Court of limited jurisdiction, its jurisdiction is exclusive in the field in which it operates, abrogating the common-law right of action for damages by an employee, and substituting an exclusive remedy in place of all other liability. *Carroll v. District Court of Fifteenth Judicial Dist. Court, Cherokee County, Okl.*, 579 P.2d 828 (Okl. 1978). Thus, the liability of Lee Way, guaranteed by PepsiCo, was so determined by the Workers' Compensation Court.

For the foregoing reasons, PepsiCo has been fully afforded its rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America. Its Petition for Writ of Certiorari to the

Supreme Court of Oklahoma should, therefore, be denied by this Honorable Court.

Respectfully submitted,

JIM GRENNAN
2000 Classen, Suite 120 S.
Oklahoma City, OK 73106
(405) 525-8606

Counsel for Respondent

INDEX TO APPENDICES

		APP. PAGE
A.	Okla. Stat. Title 85, ch. 4, App. Rule 15 (1981) ...	1
B.	Transcript of Proceedings before the Workers' Compensation Court on February 25, 1985	4
C.	Okla. Stat. Title 85, Section 22(5), Schedule of Compensation	9

APPENDIX A

85 Ch. 4, App.
Rule 15

Okla. Stat. Title 85, ch. 4, App. Rule 15 (1981)

Termination of Temporary Compensation

The employer may terminate temporary compensation, whether begun voluntarily or by order, without a new order of the court in the event that, (1) the employee has not filed either a Form 3 or Form 3b with the court, (2) the employee returns to full time employment with that employer or, (3) the parties voluntarily agree in writing that such payments may terminate. A copy of this agreement shall be filed with the court if the employee has filed either a Form 3 or Form 3b. In all other events, temporary compensation may be terminated only in the manner to be stated herein. The employer shall file with the court and mail to the employee copies of its Motion to Set for Hearing (Form 11). If the reason for the employer's request to make such termination is based upon the written medical report of a physician who indicates that the employee has been released from the physician's professional care and is able to return to work, then a copy of that report, which is to be offered at the hearing, shall be attached to Form 11. The attached medical report shall not be considered as part of the evidence before the court unless it is admitted at the subsequent hearing. The employee shall then have fourteen (14) days from the date that he has received the

employer's Form 11 in order to file with the court and to mail to the employer copies of his Objection to the Termination of Temporary Compensation. This objection shall be on a Form 12 and shall state the reason for the employee's objection. If that reason is based upon a medical report to be offered by the employee at the hearing then a copy of that report shall be attached to the Form 12. Unless the objection has been filed by the employee within the above fourteen (14) day period, the employer may then terminate temporary compensation retroactively to the date the Form 11 was filed with the court. The time for filing such an objection may be extended for a reasonable period of time upon written application by the employee either to the Presiding Judge or the Judge to whom the matter is assigned provided that the application shall state the following: (1) the name of the physician who is to examine the employee, (2) the date the examination is to be made, (3) the date the employee made the appointment for such examination, and (4) the date the employee expects to have the medical report from said examining physician.

Upon the receipt of the employee's Objection to the Termination of Temporary Compensation, the docket clerk of the court shall set the matter for hearing on a priority basis giving ten (10) days notice to all parties. The matter shall then be heard ahead of any other pending matter before the court, except for Objections to the Commencement of Temporary Compensation as provided above. The employer shall continue to pay temporary compensation until further order of the court even if this occurs after the requested hearing but the employer shall be entitled to receive credit for any over-payment of

temporary compensation against any subsequent order for permanent compensation. (Emphasis added.)

APPENDIX B

BEFORE THE WORKERS' COMPENSATION COURT
OF THE STATE OF OKLAHOMA

CLINTON SHARP, CLAIMANT,	)	
VS.	)	NO. 84-3754-K
LEE WAY MOTOR FREIGHT AND/OR PEPSICO, RESPONDENT,	)	
OWN RISK, INSURANCE CARRIER.	)	

TRANSCRIPT OF PROCEEDINGS
ON FEBRUARY 25, 1985
IN OKLAHOMA CITY, OKLAHOMA

HONORABLE JACQUE JEFFRIES BRAWNER, JUDGE

APPEARANCES:

Mr. Jim Grennan, Attorney at Law, 2000 Classen Center 120 South, Oklahoma City, Oklahoma 73106
Appearing on behalf of Claimant,

Mr. Albert M. Morrison, Attorney at Law, 1212 NW 50th, Oklahoma City, Oklahoma 73118
Appearing on behalf of Respondent and Carrier.

Reported by:

Barbara Barrowman, C.S.R., R.P.R.
Official Reporter
Workers' Compensation Court.

PROCEEDINGS

BY THE COURT: This is the case of Clinton A. Sharp versus Lee Way Motor Freight and/or Pepsico. There was an accident on December 21st 1983. This gentlemen injured his back. The rates in this case are $212.00, $159.00. Temporary was paid in this case from January 1st '84 to December 8th 1984. Temporary is owing in this case from December 9th '84, continuing. The issue of permanent disability has been reserved.

All of this has been agreed by stipulation. Mr. Grennan has asked for interest on the non-payment and the only real issue in this case is should this Order be written against Lee Way or against Lee Way and Pepsico. I think Counsel would like to make some comments on this issue. Mr. Morrison.

BY MR. MORRISON: Pepsico has been served and I am appearing as attorney for Pepsico, also. And, at this time, we would object to any order being written against Pepsico as they are only a guarantor and there's no Order of the Court that Lee Way has failed to comply with that would fall within the terms of the Guarantee Agreement, assuming the Guarantee Agreement would apply to this case, which we do not admit at this time.

BY THE COURT: All right. Mr. Grennan.

BY MR. GRENNAN: By way of response, the Guarantee, as of record out of the Court, and we have furnished the Court a copy of that Guarantee this morning. We feel that it is applicable, being a Guarantee, it is applicable to the issue here this morning.

And we would ask that the Court specifically find in the Order that this Guarantee, by its terms, is actually guaranteeing payment and Pepsico, Incorporated, as Guarantor of the Order of this Court. And, we would ask that a specific finding be made a part of the Court's order ordering payment by either Lee Way, Incorporated or Pepsico, Incorporated as Guarantor for Lee Way.

BY THE COURT: Anything else?

BY MR. MORRISON: In that event, Your Honor, I would argue that the accident occurred prior to the terms of the Guarantee Agreement at the time when Lee Way Motor Freight was a qualified own risk carrier and that they are the only parties that are liable. The Guarantee Agreement does not cover this accident in any way, shape, form or fashion.

And also, we would argue that the Guarantee Agreement had been revoked, by letter, prior to time this case was called for hearing, and therefore, has no force and effect at this time.

BY THE COURT: Anything further, Mr. Grennan?

BY MR. GRENNAN: The Order, of course, Your Honor, speaks for itself. That beings with, to enable the continuing compliance by Lee Way and because the nature of the claims in this Court and because of the nature of Pepsico making that Guarantee of continuing compliance, we feel that the Guarantee covers all obligations that were in effect as to Lee Way at the time under their Own Risk permit, which would include Mr. Sharp's claim and in which Lee Way had acknowledged the claim and had been making payment.

And we think the Guarantee is simply, as stated therein, given to this Court to enable the continuing compliance by Lee Way in guaranteeing and assuring this Court that the obligations of Lee Way, under the Own Risk Permit, would be met by either Lee Way or Pepsico, as their guarantor in order to permit the continued complicance (sic) or continued own risk permit with Lee Way before this Court.

And we feel that the Court took that Guarantee on that basis from the own risk file of this Court permitting Lee Way to continue on as own risk on their claims because of this Guarantee given to those claims that Lee Way had also, one of which was Mr. Sharp's claim. And we feel that the Guarantee is in effect as to those claims, including Mr. Sharp's.

BY THE COURT: Is there anything further in this case?

BY MR. MORRISON: Nothing further. Respondent rests.

BY MR. GRENNAN: Nothing further.

BY THE COURT: You may be excused.

(End of proceedings.)

BEFORE THE WORKERS' COMPENSATION COURT
OF THE STATE OF OKLAHOMA

CLINTON SHARP, CLAIMANT,	)	
VS.	)	NO. 84-3754-K
LEE WAY MOTOR FREIGHT AND/OR PEPSICO, RESPONDENT,	)	
OWN RISK, INSURANCE CARRIER.	)	

CERTIFICATE OF COURT REPORTER

I, Barbara Barrowman, a Certified Shorthand Reporter, and one of the official court reporters in and for the Workers' Compensation Court of the State of Oklahoma, do hereby certify that the within and foregoing is a full, true, correct and complete transcript of my stenographic notes of the trial proceedings had and heard in the above-styled and numbered cause on the 25th day of February 1985, in Oklahoma City, Oklahoma, before Judge Jacque Jeffries Brawner.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 18th day of September, 1988.

/s/ Barbara Barrowman (SEAL)
BARBARA BARROWMAN,
C.S.R. within and for
the State of Oklahoma.

APPENDIX C

Oklahoma Statutes, Title 85, Section 22(5)

Schedule of compensation.

5. Notwithstanding any other section of the Workers' Compensation Act, temporary disability shall be payable without an award by the Court. The first payment of temporary disability compensation shall become due on the tenth day after the employer has received notice of injury as specified in Section 24 of this title. All compensation owed on that date shall be paid and thereafter payments shall be made weekly except when otherwise ordered by the Court.

If any compensation payments owed without an award are not paid within ten (10) days after becoming due there shall be added to such owed payments an amount equal to ten percent (10%) of the amount due which shall be paid at the same time in addition to the owed payments unless such nonpayment is excused by the Court after a showing by the employer that conditions exist over which the employer had no control in that either payments were not made within the prescribed time or the employer denies coverage within the time specified for employer to respond.